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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF
MISSISSIPPI

AT THE
MARCH AND OCTOBER TERMS, 1916.

VOL. 112.

REPORTED BY
ROBERT POWELL

COLUMBIA, MISSOURI
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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT. OF MISSISSIPPI

AT THE

OCTOBER TERM, 1916.

STATE *v.* WIDMAN.

[72 South. 782.]

1. **ANIMALS.** *Tax or license. Constitutional provisions. Equal protection of the law. Dog tax. Evidence. Judicial notice. Ex post facto law. Imprisonment for debt. Repeal of law.*

Laws 1910, chapter 110, providing for a tax of one dollar on every male dog over six months old, and three dollars on every female dog over six months old and leaving it optional with each county whether its provisions shall be put in operation therein, either by the board of supervisors or by an election, does not violate section 112, Constitution 1890, authorizing the legislature to impose a tax upon such domestic animals as from their nature and habits are destructive of other property. Nor does it violate the Fourteenth amendment of the Constitution of the United States, securing to every citizen the equal protection of the law, since while it discriminates between male and female dogs, it applies to every owner of dogs in the same situation.

2. **EVIDENCE.** *Judicial notice. Character and habits of domestic animals.*

The courts take judicial notice of the character and habits of domestic animals. .

3. **CONSTITUTIONAL LAW.** *Imprisonment for debt. Dog tax.*

The provision of the state Constitution prohibiting imprisonment for debt has reference to debts founded on contract. It has no application to taxes.

(1)

4. CONSTITUTIONAL LAW. *Ex post facto* law. Dog tax.

Where Laws 1910, chapter 148, providing for a tax on dogs and making it optional with each county whether its provisions should be put in operation therein either by the board of supervisors or by an election, was put in operation in a county by an order of the board of supervisors on February 5, 1914, and defendant was tried under an affidavit charging him with failing to pay a tax on a dog owned by him on February 1, 1914, such a trial was not under an *ex post facto* law, since the law put the tax into immediate operation, and the offense charged was the failing to pay taxes when due and this occurred after the law was put in force.

5. CRIMINAL LAW. *Prosecution. Repeal of law.*

A prosecution begun under the Laws of 1910, chapter 178, before its repeal could be concluded after the repeal of the statutes since Code 1906, section 1573, so provides.

APPEAL from the circuit court of Pike county.

HON. J. B. HOLDEN, Judge.

Will Widman was charged by affidavit before a justice of the peace with failing to pay a dog tax. Demurrer to affidavit sustained, affidavit quashed and state appeals.

The facts are fully stated in the opinion of the court.

Ross Collins, Attorney-General, for the state.

Price & Price and *F. D. Hewitt*, for appellee.

POTTER, J., delivered the opinion of the court.

This is an appeal under the provisions of section 40 of the Code of 1906, providing, among other things specified therein, that the state or any municipal corporation may prosecute an appeal from a judgment sustaining a demurrer to, or a motion to quash, an indictment or an affidavit charging crime.

Will Widman was charged by an affidavit in the justice of the peace court in Pike county with failing and refusing to pay a tax on a dog levied under the provisions of chapter 148 of the Laws of 1910 put into opera-

tion in said county by an order of the board of supervisors on the 5th day of February, 1914.

Chapter 148 of the Laws of Mississippi of 1910 provides for a *per capita* tax of one dollar upon each and every male dog over six months old, and the sum of three dollars upon every female dog over six months old, to be collected from the owner, keeper, or harbinger of any such dog. This act leaves it optional with each county whether or not its provisions shall be put in operation therein, and provides two methods whereby the counties may elect to put said law into operation: First, the board of supervisors may of its own motion levy the tax in question; second, on the failure of the board to levy the tax in question on petition in writing of twenty per cent. of the qualified electors the board of supervisors must submit to the qualified electors of the county at an election the question of this levy, and upon a vote of a majority of those voting at such election the board of supervisors is required to enter an order levying the tax in question.

“When any county shall have once levied said tax the board of supervisors shall levy said tax each succeeding year until the same shall be voted down by the majority of the electors at an election to be held for that purpose upon petition for the same in the same way and manner as provided herein for initiating the same.”

The above-mentioned law was put in force in Pike county by order of the board of supervisors on the 5th day of February, 1914 and remained the law in Pike county until the 3d day of April, 1915, when an election was held as provided in said statute, and the same was suspended from operation in said county by a vote of the people.

The following affidavit in a justice of the peace court in Pike county was made against the appellee Will Widman:

“State of Mississippi, Pike county. Before me, the undersigned officer for and in said county and state

aforesaid, Thomas Mitchell, on information makes affidavit that on the 1st day of February, 1914, in the county and state aforesaid, in district No. 2 thereof, one Will Widman was the owner of and had control over one male dog, which dog was then and there subject to taxation, and was, by the proper authorities, duly assessed for the taxes for the fiscal year of 1914, which tax amounted to the sum of one dollar, and that said assessment was made under and by virtue of chapter 148 of the Laws of Mississippi of 1910, and also under and by virtue of an order duly passed by the board of supervisors of Pike county, Mississippi, on the 5th day of February, 1914, which order of the board of supervisors made it the duty of the tax assessor to assess each and every owner of dogs with one dollar taxes on male dogs, and three dollar taxes on female dogs.

"That the said Will Widman was assessed as being the owner of one male dog, and, notwithstanding these facts, the said Will Widman willfully failed and knowingly refused to pay said taxes on said dog, as he was required to do by chapter 148 of the Laws of Mississippi of 1910, and the order of the board of supervisors, as promulgated by said board on date aforesaid, and in so doing, the said Will Widman violated chapter 148 of the Laws of 1910, and the order of the board of supervisors of Pike county, Mississippi, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Mississippi."

A demurrer was filed to this affidavit by the defendant, setting out the following grounds of demurrer:

"First. Because chapter 148 of the Laws of 1910 of the state of Mississippi is unconstitutional, in that it is in violation of section 112 of the Constitution of the state of Mississippi, and also violates section 30 of the Constitution of the state of Mississippi.

"Second. Said Laws of 1910 is also in violation of article 13 of the Constitution of the United States, that

provides that no citizen thereof shall be denied the equal protection of its laws.

"Third. Affidavit does not state act done knowingly.

"Fourth. For other and further causes to be made known on the hearing of this demurrer. Because it provides for imprisonment for debt."

The defendant also filed a motion to quash the affidavit on the ground that the law is *ex post facto*, and therefore violates both the state and the Federal Constitutional inhibitions against the passage of *ex post facto* laws. Both the demurrer and motion to quash were tried together by agreement, and the court, sitting as judge and jury, sustained the demurrer, quashed the indictment, and acquitted the appellee.

The ground of demurrer most seriously pressed in the briefs of counsel is that the act in question violates section 112 of the Constitution of Mississippi, because the legislature provides in this law for a *per capita* assessment of one dollar for male dogs, and three dollars for female dogs. Under the constitutional provisions under consideration the legislature is authorized to impose a tax *per capita* upon such domestic animals as from their nature and habits are destructive of other property. The purpose of the act in question is to discourage the propagation of such domestic animals as the legislature in its wisdom may consider destructive of property from their nature and habits. It is therefore a legitimate exercise of legislative authority to discriminate in levying said tax between male and female dogs, and this does not violate the fourteenth amendment to the Constitution of the United States, providing that every citizen thereof shall be given equal protection of its laws, because while this statute discriminates between male and female dogs it applies to every person in the same situation alike. For every person who owns a male dog is required to pay one dollar, and every person owning a female dog is required to pay three dollars.

It is urged that dogs are not such animals as from their nature and habits are destructive of other property. The courts, however, take judicial notice of the character and habits of domestic animals, and it is a matter of universal knowledge that dogs maim and destroy sheep and other animals, and are in many other ways destructive of property, and it is therefore competent for the legislature to declare that dogs belong to the class of animals designated in the provision of the Constitution under consideration as destructive of other property. To designate the classes of animals to be taxed under this provision is confided by the Constitution in the legislature, and the legislature in its discretion has determined dogs to belong to this class.

The objection is raised that this statute is unconstitutional, because it violates the provision of the Constitution of the state against imprisonment for debt. The Constitution has reference to debts founded on contract. It has no application to taxes. Cooley on Taxation, p. 21, and citations thereunder.

It is urged that the defendant was tried under a law not in existence at the time the offense was committed, because he was assessed as being the owner of a dog on the 1st day of February, 1914, and the statute levying the tax was not put into operation in Pike county until the 5th day of the same month and year. Therefore it is argued that the defendant was tried under an *ex post facto* law. This ground is not well taken. The law put the tax into immediate operation; therefore the assessment, as of February 1st, is correctly made. *Railroad Co. v. Middleton*, 109 Miss. 199, 68 So. 146. But the offense charged to have been committed in this instance was the offense of failing to pay the tax when due, and this occurred after the law was put in force; consequently the law is not *ex post facto*, as to the crime charged.

It is also insisted by counsel that this prosecution could not be lawfully continued because the law under

which it had been begun was repealed at the time the prosecution was commenced, but section 1573 of the Code of 1906 provides that no change in any law affecting a crime or its punishment, etc., shall defeat the prosecution of any crime committed prior to its enactment, whether such prosecution be instituted before or after such enactment. Therefore the express provisions of said statute dispose of the last contention.

Reversed.

MCCOY ET AL. v. J. I. CASE THRESHING MACHINE CO.

[72 South. 784.]

1. **FRAUDULENT CONVEYANCES.** *Bills to subject property. Action at law on debt. Parties to action. Joinder. Misjoinder. Equity. Necessary parties. Prior lien holders. Pleading. Allegations of fraud.*

Although plaintiffs had commenced proceedings at law for the recovery of the debt, which is the foundation of their bill in equity, this did not preclude them from prosecuting, at the same time, with the action at law, a bill in equity to subject property fraudulently conveyed by the defendants.

2. **FRAUDULENT CONVEYANCES.** *Misjoinder of party defendants. Equity.*

When a bill in equity neither states a cause of action against, nor seeks any relief from, one of the defendants, such defendant is improperly joined as a defendant, but such misjoinder should not result in the dismissal of the bill as to any other of the defendants.

3. **FRAUDULENT CONVEYANCE.** *Necessary parties defendant. Prior lien holders.*

Where a bill in equity sought to subject property fraudulently conveyed, it was not necessary that the holders of liens placed on the property involved prior to the execution of the alleged fraudulent conveyances, should be made parties defendant, where such liens were not attacked.

4. FRAUDULENT CONVEYANCES. *Pleading. Allegations of fraud.*

Where a bill in equity charged that the deeds sought to be cancelled, other than the one to a named lumber company were executed without any consideration having been paid therefor by the grantees therein, for the purpose on the part of both the grantors and grantees of hindering, delaying and defrauding the complainant in the collection of its debt, which fact was known to such lumber company when it afterwards purchased the land from the alleged fraudulent grantees, the said lumber company thereby intending to aid in placing the lands still further beyond the reach of the debtor's creditors, such allegations of fraud were sufficient to call for an answer.

APPEAL from the chancery court of Scott county.

HON. SAM WHITMAN, JR., Chancellor.

Suit by J. I. Case Threshing Machine Company against S. D. McCoy and others. From an order overruling a demurrer to the amended bill of complaint, defendant appeals.

This is an appeal from an order of the chancery court overruling a demurrer to the amended bill of complaint filed by appellees herein. The bill sought to set aside certain conveyances made by appellees as being fraudulent as against the rights of complainant, a creditor of the defendants. The bill charges that defendants S. D. McCoy and S. C. McCoy, being indebted to the complainant (appellee herein), rendered themselves insolvent and hindered, delayed, and defrauded complainant by attempting to convey, and by conveying, to members of their families, all their property real and personal subject to execution, thus rendering it impossible to collect the debt unless these conveyances be set aside. The appellee had already filed its suit in the circuit court for judgment on the debt issue, and while said suit was pending filed this suit in equity to set aside the conveyances as hereinbefore set out. There was a demurrer to the bill which was overruled by the court, and the defendant appeals

Howie & Howie, for appellants.

It is urged that the point in the demurrer as to the misjoinder of G. R. McCoy is not well taken because it was alleged that he was a party to fraud. Now let us look at the record and see whether this is correct or not. Of course we admit that there are several blanket averments charging everybody with delaying the appellee and defrauding it.

But when it comes to setting out the allegations of fraud, not the conclusions of the pleader, what does the record show? The land conveyed to him was conveyed by a trustee at a trustee's sale. The appellee says in its bill as to this sale that: "Complainant avers that the first deed of trust on said land was held by T. B. Gaddis, and that the same was foreclosed, so far as complainant is aware, by due process of law, that the said land was purchased by G. R. McCoy at and for the indebtedness mentioned in the first deed of trust to T. B. Gaddis, and no part of it remained to be applied on your complainant's said deed of trust." This land was sold by G. R. McCoy to Hall-Legan Lumber Company, under deed which appears as exhibit no. 6. The prayer for relief in both the original bill and the amended bill ask that the deed, (exhibit 6, page 33), be cancelled. In other words it alleges the facts to be that the land was legally sold to the appellant, G. R. McCoy, for the satisfaction of a legal deed of trust and the title vested in him and yet asked that the sale by him to another party be cancelled and held for naught and that this same land which was legally sold to him shall be sold to satisfy the debt of the complainant against another of the appellants. No debt is due from G. R. McCoy to the appellee and none is claimed, yet the bill seeks to take his land which he has already sold to another party and cancel the sale by him to his grantee and sell it to satisfy the debt of a third party. Had as well argue that any

number of persons that have not privity of relation on the issues involved could be joined, and large costs thus piled up, and yet contend that none of the defendants could object. Of course there is no possibility of the land ever being taken away from him, but in the meantime costs will be piling up and it will take proof to show the facts, if it was proper to join him in the case and all this will ultimately have to be paid by the loser. In other words the appellee figures on playing fast and loose with the hope of catching some of the defendants.

It is also insisted that the beneficiaries in the deed of trust are not proper parties. Why not? The deeds to the various parties recite that the grantees are to assume the deeds of trust. This obligation is binding on the grantees. They will have to pay these debts, if they have not done so already. If they have already paid them they would certainly be entitled to what they paid out. If not the beneficiary in each ought to have some opportunity to protect their interest. What does the prayer ask? Not that the land be sold subject to these prior claims or that the money be first applied on these. But that the land in its entirety, be sold and the proceeds applied, *in toto*, toward the payment of appellee's claim. We insist—and that very earnestly—opinion of counsel to the contrary notwithstanding—that on the allegations of the bill, the appellee is not intitled to this relief. It would not be just for the court to enter the decree as prayed, and that is the test, when it appears from the bill itself that they are not entitled to it. Suppose a decree *pro confesso* was to be taken granting the relief prayed for, which is what would have to be granted if it was not contested, would the court grant a decree ordering the property on which the holders of the trust deeds had a lien to be sold and the proceeds applied when they had not been made a party? It is a serious cloud to place on the title of a man's land to order it

sold and then enter a decree confirming the sale. It would not be equitable to do this when the court had it from the mouth of the appellee itself that they had an interest which was not being taken care of.

It is said that the appellants have no interest in this matter of the holders of the deed of trusts. But they have. They must be presumed to desire that the money loaned on the land be paid back. They are interested to the extent of desiring to not have their creditors, who they honestly think they owe, embarrassed in the collection of that which is due them. To that extent they are certainly interested in having these people made parties so that they can protect their interest and save the money that they advanced.

It is true that they do allege that Hall-Legan Lumber Company procured the land by a pretended deed. But they also make the deed an exhibit and it recites a *bona-fide* consideration and that this was paid. The rule is that when the allegation in the body of the bill is based on an exhibit and there is a conflict in the facts shown by the two that the exhibit is taken to be correct. In that case then the bill must be held to show that the consideration was paid.

We submit therefore that the case should be reversed and the bill dismissed.

Cooper & Cooper, for appellee.

Appellants say that the equity court below did not have jurisdiction because the debt issue was still pending in the law court, and that the chancery court has not jurisdiction to set aside conveyances during the pendency of this debt issue in the law court. The two suits are separate and apart. The same issue was not asked to be tried in both courts. One was not dependent on the other. The pendency of the suit on the debt issue did not preclude the hearing of this equity suit, and did not exclude the jurisdiction of the chancery court to set aside the conveyances as being

fraudulent on the rights of appellee. This issue has been set at rest by this court in the case of *Anderson v. Newman*, 60 Miss. 532, wherein it was pointedly held that notwithstanding the pendency of an action at law for the debt a bill may be maintained to subject property fraudulently conveyed to the payment of the debt. In this case Judge Cooper says: "Besides the demurrer was not well taken. The sole ground of demurrer is that by the bill it appears that the complainant had commenced proceedings at law for the recovery of the debt which is the foundation of the bill. This did not preclude them from prosecuting, at the same time, with the action at law, this bill to subject property fraudulently conveyed by the defendants."

And Judge COOPER cites *Speight v. Porter*, 26 Miss. 286, and *Payne v. Howell*, 40 Miss. 498, to support this position.

The next contention of appellant is that there is a misjoinder in that G. R. McCoy is made a party defendant. This is not set up in a separate demurrer of G. R. McCoy, and he is the only party who can object. Not demurring separately, it is too late for all of the defendants, appellants here, to complain. Ency. Pleading and Practice, 412. "The objection of misjoinder of parties as defendants in a bill is a mere personal privilege and consequently those only can demur for that cause who are improperly joined." 6 Ency. Pl. & Pr. 310.

But notwithstanding this fact, G. R. McCoy is a proper party; in fact is a necessary party, for he is a member of the family who, jointly with other defendants, was charged with being a fraudulent grantee, the fraudulent grantors conveying him a part of his lands. The bill also charges that he attempted to further the fraud by conveying by fictitious deed and for a feigned and pretended consideration certain of the lands to another of the defendants. By all rules of

pleading he is not only a proper party, but a necessary party. 20 Cyc. 715.

The next contention is that there is a nonjoinder of parties defendant in that certain beneficiaries in certain deeds of trust on the land fraudulently conveyed were not made parties defendant. These deeds of trust were executed before the fraudulent deeds complained of in the bill, and have no connection with them. Their validity is not questioned. The rights of the beneficiaries in these deeds of trust are not affected by the bill, and could not be. There is no contest with them. They might have been made parties without a misjoinder, but, they are not necessary parties. The United States supreme court in the case of *Venable v. U. S. Bank*, 2 Pet. 107, discussed this precise point and there held that a mortgagee holding a mortgage on property fraudulently conveyed, which was made before the execution of the fraudulent conveyance was not a necessary party to a bill which did not attack the mortgage. For other authorities we cite 20 Cyc. 712, 5 Ency. Pl. & Pr. 545; *Walter v. Reihl*, 38 Md. 211; *Trego v. Skinner*, 42 Md. 426.

But even if these were necessary parties, the appellants could not complain by demurrer. They are not the proper parties to make complaint. Non-joinder of a party against whom no relief is prayed is not ground for demurrer by other parties, for a defendant can demur for want of proper parties only when he has an interest himself in another's being made a defendant. 6 Ency. Pl. & Pr. 311. This must appear in the bill even then before demurrer can be considered.

SMITH, C. J., delivered the opinion of the court.

Although appellees "had commenced proceedings at law for the recovery of the debt which is the foundation of the bill, this did not preclude them from prosecuting, at the same time, with the action at law, this bill to

subject property fraudulently conveyed by the defendants." *Anderson v. Newman*, 60 Miss. 532.

The bill neither states a cause of action nor seeks any relief against G. R. McCoy, so that he was improperly joined as a defendant. This misjoinder, however, should not result in the dismissal of the bill as to any of the defendants except G. R. McCoy.

It is not necessary in order for appellees to obtain the relief sought for that the holders of liens placed on the property here involved prior to the execution of the deeds alleged to have been fraudulently made, which liens are not attacked in this proceeding, be made parties defendant hereto.

The effect of the allegations of the bill, as we understand them, is to charge that the deeds sought to be canceled, other than the one to Hall & Legan Lumber Company, were executed without any consideration having been paid therefor by the grantees therein for the purpose on the part of both of both the grantors and grantees of hindering, delaying, and defrauding appellee in the collection of its debt, which fact was known to the Hall & Legan Lumber Company when it afterwards purchased the land from the alleged fraudulent grantees, the said lumber company thereby intending to aid in placing the lands still further beyond the reach of the appellant's creditors. This is sufficient allegation of fraud to call for an answer.

Affirmed and remanded, with leave to appellants to answer within thirty days after filing of mandate in the court below.

Affirmed and remanded.

EX PARTE MORMON.

[72 South. 835—69 South. 1000.]

BAIL. Admission to bail. Evidence.

A party charged with homicide should be admitted to bail where the proof is not evident nor the presumption great and his health has been impaired by confinement in jail and because he has been denied a hearing on account of the term of court at which he should have been tried has been pretermitted through no fault of his.

APPEAL from the circuit court of Pontotoc county.

HON. CLAUDE CLAYTON, Judge.

Application in *habeas corpus* proceeding by Oscar Morman for bail, application denied and relator appeals.

The facts are fully stated in the opinion of the court.

R. H. & H. B. Miller, for appellant.

Lamar F. Easterling, Assistant Attorney-General, for appellee.

POTTER, J., delivered the opinion of the court.

This is an appeal from the judgment of the circuit judge refusing to grant relator, Oscar Morman, bail in *habeas corpus* proceedings.

Oscar Morman was convicted at the September, 1914, term of the circuit court of Pontotoc county for murder, and appealed to the supreme court, and the case was reversed. After considering the testimony in this case, including very material testimony excluded in the original trial of the case in the court below, and upon which a reversal of the former conviction was secured, we are of the opinion "that the proof of defendant's guilt is not evident, nor the presumption great."

There was a strong showing on the hearing of this case on *habeas corpus* that the prisoner's health has been impaired by more than two years' confinement in the

county jail. The record shows that, although relator was ready for trial at the last April term of the circuit court of Pontotoc county, said term of court at which relator's trial would have been called was pretermitted through no fault of his.

We are of the opinion that the learned circuit judge erred in denying relator bail, and his judgment is therefore reversed, and judgment will be entered here admitting relator to bail, upon the execution of a properly approved appearance bond in the penalty of five thousand dollars.

Reversed.

WATSON v. STATE.

[72 South. 836.]

HOMICIDE. Instruction on manslaughter.

Where on a trial for murder the testimony of the defendant if believed was sufficient to justify a verdict of manslaughter, it was proper for the court on request of the state to give an instruction on manslaughter.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

Julia Watson was convicted of manslaughter and appealed.

Appellant was indicted for murder and convicted of manslaughter for the killing of her husband. According to the state's evidence, a case of murder is made out. According to the evidence introduced by the defendant, she is either guilty of manslaughter, or not guilty at all. On the trial she did not ask an instruction on manslaughter, but such an instruction was given by the court at the request of the district attorney. She was convicted of manslaughter, and on appeal assigns as error the action of the court in instructing the jury that they might return a verdict of manslaughter.

A. A. Chaney, for appellant.

Geo. H. Ethridge, Assistant Attorney-General, for the state.

HOLDEN, J., delivered the opinion of the court.

The contention of the appellant, that the instruction on manslaughter granted by the lower court in this case is error, is, under the facts here, untenable. The testimony of the appellant in the lower court, which the jury had a right to believe or disbelieve in whole or in part, was sufficient to justify the verdict of manslaughter. This case comes within the rule announced in *Echols v. State*, 70 So. 694.

The judgment of the lower court is affirmed.

Affirmed.

HUSBANDS v. STATE.

[72 South. 836.]

TRESPASS. *Trespass less than larceny. Taking hog. Statute.*

Where defendant assisted the owner of a cornfield, to take up and pen a hog belonging to another, which was depredating in said field, and the owner of the field demanded of the owner of the hog fifty cents for taking it up which he refused to pay, and thereupon defendant bought the hog from the party taking it up and offered the hog to its owner for fifty cents. In such case he was not guilty of violating Code 1906, section 1264, which provides, that any person who shall, without the owner's consent, take and carry away any hog, etc., where the taking and carrying away does not amount to larceny, shall be fined or imprisoned, but that the section shall not apply to any one who takes property believing in good faith that he has a right to it, since in such case there was nothing wrongful in the taking up of the hog but it was taken up in good faith.

112 Miss.—2

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Jesse Husbands was convicted of a trespass less than larceny and appealed.

The facts are fully stated in the opinion of the court.

Salter & Hamilton, for appellant.

We submit that in order to have sustained a conviction for trespass less than larceny, it was incumbent upon the state to show by testimony, to a moral certainty and beyond every reasonable doubt, that the taking away was wrongful. But the state's testimony shows affirmatively (and there is no conflict) that the hog was taken up because it was eating the crops of both appellant and Joe Peterson. Was it unlawful for them to do this? In the case of *State v. Stephens*, 3 So. 458, the supreme court says: "It was immaterial whether the appellant had a lawful fence or not. The motive with which the act was done is the test as to whether it was criminal or not," citing *Q. Bish. St. Crimes*, paragraphs 594, 597; *Wright v. State*, 30 Ga. 325; *State v. Waters*, 6 Jones (N. C.) 276; *Thomas v. State*, 30 Ark. 433; *Lott v. State*, 9 Tex. App. 206. And we most respectfully submit that the court should have, and committed reversible error, in not sustaining the defendant's motion to exclude the state's testimony and to direct a verdict of not guilty. We respectfully submit that the record shows that Peterson endeavored to comply with section 2222, 2227 of the Code of 1906, dealing with trespassing stock, and that if he erred, it was simply a matter of judgment for which he alone was amenable in a civil action.

Geo. H. Etheridge, Assistant Attorney-General for the State.

The appellant was indicted for the larceny of one hog, and convicted of trespass less than larceny. It appears that the prosecution originated over the taking up of a trespassing animal and after refusal by the owner to pay the damages, the selling of such trespassing animal with-

out going through the form and process of law required in such cases. The appellant bought the trespassing animal and seems to have had full knowledge of the facts, and of course must be charged with a knowledge of the law (although as a matter of fact he perhaps knew as little law as any citizen of the land), and technically falls within the provision of the statute. There can be no doubt, from the record that the pig was a trespassing animal and that the taker up had a right to take it up; but he wholly failed after taking up the animal to comply with the law as to having the damages assessed, and the animal condemned to pay such damages in any legal manner.

It is true that the witnesses for the defense claimed that the owner had given the hog to them, but he denies this and the jury found the facts on this conflict against the appellant, and the court is bound to assume the finding was correct. The action of the court in permitting the amendment to the affidavit was correct as the statute expressly authorizes such amendments to be made on appeal from justice of the peace courts. It may be true that a twenty-five dollar fine for wrongful withholding the possession of a dollar pig is pretty steep, but then the court knew that the price of meat was bound to rise, and evidently wanted to discourage practices of the kind shown in this record; and perhaps wanted to discourage litigation over worthless "pine rooters."

SYKES, J., delivered the opinion of the court.

An affidavit was made against the appellant and one Joe Peterson before a justice of the peace of Lamar county, charging them with having stolen "one female hog of the value of seven dollars." The appellant here was convicted in the circuit court of a "trespass less than larceny," for which he was fined twenty-five dollars by the circuit judge, and from which judgment this appeal is prosecuted.

The testimony in the case shows that the "female hog" in question was found by Jesse Husbands and Joe Peterson in the cornfield of Peterson eating the corn, and that at the request of Peterson the appellant helped him catch the hog and put it in a pen at Peterson's house. Lige Cooley, who had the custody of the hog, was notified that Peterson had the hog up and to come over and pay for the keeping of the hog. Peterson at first wanted Cooley to pay him a dollar, but later on agreed to take fifty cents. It seems, however, that Cooley was not willing to pay anything for the hog, and finally Peterson sold the hog to the appellant here for fifty cents, and the appellant moved the hog to his pen. Appellant also offered to turn the hog over to Cooley upon payment of fifty cents, but Cooley was not willing to pay this amount. Cooley then made affidavit against Peterson and Husbands for stealing the hog. The appellant was evidently convicted under section 1264 of the Code of 1906. In this case, however, there was nothing wrongful in the taking up of the hog, and the record further shows that the appellant and Peterson took the same up in good faith, believing that they had a right to do so. The case is therefore reversed, and the appellant discharged.

Reversed.

GILCHRIST-FORDNEY Co. v. PRICE.

[72 South. 836.]

NEGLIGENCE. *Question for jury. Peremptory instruction.*

In an action for personal injury alleged to have been caused by the negligence of the defendant where the fact as to whether or not defendant was guilty of negligence was disputed, the case should have gone to the jury.

APPEAL from the circuit court of Jasper county.

HON. W. H. HUGHES, Judge.

Suit by Mathew Price against the Gilchrist-Fordney Company. From a judgment for plaintiff on peremptory instruction, defendant appeals.

Appellee, plaintiff in the court below, brought an action for damages against the appellant for two thousand dollars for alleged injuries received by him by reason of his coming in contact with a telephone wire of the appellant, which was strung on a line of poles along the right of way of appellant's logging road, and which it is alleged had negligently become suspended across the road at a height of only about six feet, so that the plaintiff, who was riding horseback, came in contact with the wire and received the alleged injuries for which he sued. The court granted a peremptory instruction for the plaintiff, and the jury returned a verdict of eighty dollars. On appeal it is contended that the evidence raises a question of doubt as to whether there was any negligence on the part of the defendant, and in this state of the case the question of liability should have been submitted to the jury.

Stone Deavours, for appellant.

HOLDEN, J., delivered the opinion of the court.

The evidence in the lower court, as disclosed by the record in this case, presented a question of fact as to whether or not the appellant was guilty of negligence, and this question of fact should have been submitted to the jury for their determination. Therefore the peremptory instruction granted to the appellee by the court below, instructing the jury to find for the plaintiff, was error.

The judgment of the lower court is reversed, and the cause remanded.

Reversed and remanded.

HILER v. CITY OF OXFORD.

[72 South. 837.]

LICENSES. Privilege tax on automobiles. Statute.

Municipalities cannot impose a privilege tax on motor vehicles, since they are forbidden to do so by section 15, chapter 120, Laws 1914.

APPEAL from the circuit court of Lafayette county.

HON. J. L. BATES, Judge.

Suit by city of Oxford against A. V. Hiler for keeping and operating two automobiles for hire in the city without having first paid the privilege tax required by Laws 1914, chapter 96, section 1 and ordinance No. 81 of the city. From a judgment of conviction, defendant appeals.

The facts are fully stated in the opinion of the court.

James Stone & Son, for appellant.

SYKES, J., delivered the opinion of the court.

The appellant, A. V. Hiler, was tried and convicted before the mayor of the city of Oxford for keeping and operating two automobiles for hire in the city between September 1, 1915, and September 1, 1916, without having first paid the privilege tax to the city required by section 1 of chapter 96 of the Laws of Mississippi of 1910, and Ordinance No. 81 of the city of Oxford, from which judgment of conviction an appeal was prosecuted to the circuit court, where the case was tried by agreement before the judge without a jury, and which again resulted in a conviction, from which judgment this appeal is prosecuted.

The agreed statement of facts shows that the appellant is engaged in the livery and transfer business in the city of Oxford, and has paid all of the legal taxes due by him for conducting this business, and has paid all

privilege taxes due the state and county for operating the two automobiles, but has not paid the privilege tax, if any be due, to the city of Oxford on the two automobiles owned and operated by him between the above dates. It is the contention of the appellee that under section 15 of chapter 120 of the Laws of Mississippi of 1914 a municipality cannot collect a privilege tax of any kind upon automobiles.

Section 15, chapter 120, of the Laws of 1914 reads as follows:

“No municipality, levee district board or drainage district shall impose a privilege tax or registration fee upon any motor cycle, electric motor vehicle, commercial motor vehicle or motor vehicle; and shall not require any registration of same.”

Section 1 of the above chapter also defines the term “motor vehicle.” The above section expressly prohibits any municipality from imposing a privilege tax on these motor vehicles. The city of Oxford, therefore, was without authority to impose any privilege tax whatever on the appellant for operating his two automobiles. The case is reversed, and the appellant is discharged.

Reversed.

STATE v. SOUTHERN RAILWAY COMPANY IN MISSISSIPPI.

[72 South. 837.]

1. INDICTMENT AND INFORMATION. *Sufficiency. Following language of statute. Railroads. Regulations. Posting of anti-tipping statute.*

Under Laws 1916, chapter 136, section 3, providing that each dining car, railroad, or sleeping car company, doing business in this state, shall post two copies of the anti-tipping statute in conspicuous places in each passenger coach or sleeping car,

while the language of the statute is broad enough to require the posting of the statute in all passenger coaches, not only while actually being used for the transportation of passengers, but also while not in use, but standing idle on the tracks, yet it is clear that its purpose is to make criminal only, the failure to post it in passenger coaches while actually being used for the transportation of passengers and an indictment under this statute which fails to allege this is insufficient.

2. SAME.

Where the language of the statute is so specific as to give notice of the act made unlawful, and so exclusive as to prevent its application to any other acts than those made unlawful, it is sufficient to charge the offense by using only the words of the statute, but where the act prohibited does not clearly appear from the language employed, or where, under certain circumstances, one may lawfully do the thing forbidden, by the literal meaning of the words of the statute, it is not sufficient to indict by the use only of the statutory words.

3. SAME.

Where the language of the statute is broader than its purpose, and the indictment is in the words of the statutes it cannot be told whether the jury intended to find defendant guilty of the act forbidden by the statute, or of those only, within its literal but not its true construction and in such case it is necessary for the pleader to depart from the statute and indict in words aptly charging, in all cases in which the words of the statute do not by legal intentment import a particular offense certainly committed by one who has violated its literal language.

APPEAL from the circuit court of Leflore county.

HON. F. E. EVERETT, Judge.

The Southern Railway Company in Mississippi was indicted for a violation of Laws 1912, chapter 136, section 3 and from a judgment sustaining a demurrer to the indictment, the state appeals.

The facts are fully stated in the opinion of the court.

Geo. H. Ethridge, Assistant Attorney-General, for the state.

Cathings & Cathings, for appellee.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a judgment sustaining a demurrer to an indictment for an alleged offense under section 3, chapter 136, Laws 1912, which provides that:

“Each dining car, railroad, or sleeping car company doing business within the state, shall post two copies of this act in conspicuous places in each passenger coach or sleeping car.”

The alleged violation of the statute as charged is that appellant—

“a corporation, a railroad company doing business within said state, in said county, on the 23d day of September, 1914, unlawfully, knowingly, and willfully, did, then and there, fail and neglect to post in two conspicuous places in its passenger coach No. 1363 two copies of an act entitled ‘An act to prohibit hotels, restaurants, cafes, dining cars, railroad companies and sleeping car companies from allowing “tips” to be given to employees; to prohibit employees of hotels, restaurants, cafes, dining cars, railroad companies and sleeping car companies from receiving same,’ the same being chapter 136 of the Laws of Mississippi for 1912.”

One of the grounds upon which it is sought to sustain the judgment of the court below is that:

“The indictment wholly fails to allege that passenger coach No. 1322 was being used by the appellee at that time as a part of a train engaged in hauling passengers.”

The language of the statute is broad enough to require the posting of the statute in all passenger coaches, not only while actually being used for the transportation of passengers, but also while not in use, but standing idle upon the track. It is clear, however, that it is the purpose of the statute to make criminal only the failure to post it in passenger coaches while actually being used for the transportation of passengers. So, to say that appellant failed to post the statute in one of its passenger coaches, without more, simply charges it with not doing a thing the doing of which is enjoined or not by the statute, according to circumstances; and the rule is

that "where the language of the statute is so specific as to give notice of the act made unlawful, and so exclusive as to prevent its application to any other acts than those made unlawful," it is sufficient "to charge the offense by using only the words of the statute." "But where the act prohibited does not clearly appear from the language employed, or where, under certain circumstances, one may lawfully do the thing forbidden by the literal meaning of the words of the statute, it is not sufficient to indict by the use only of the statutory words; under such circumstances, the indictment must charge in apt language the unlawful act, that the defendant may be advised of the nature and character of the offense with which he is charged, and that he may by demurrer take the opinion of the court whether the facts charged constitute an offense." "The verdict of a jury does nothing more than verify the facts charged; and if these do not show the party guilty, he cannot be considered as having violated the statute." SHAW, C. J., in *Commonwealth v. Odlin*, 23 Pick. [Mass.] 275. Where, therefore, the language of the statute is broader than its purpose, and the indictment is in the words of the statute, it cannot be told whether the jury intended to find the defendant guilty of the act forbidden by the statute, or of those only, within its literal but not its true construction. It is therefore necessary for the pleader to depart from the statute and indict in words aptly charging an offense, in all cases in which the words of the statute do not by legal intendment import a particular offense certainly committed by one who has violated its literal language." *Sullivan v. State*, 67 Miss. 346, 7 So. 275; *Jesse v. State*, 28 Miss. 100; *Harrington v. State*, 54 Miss. 490; *Rawls v. State*, 70 Miss. 739, 12 So. 584; *State v. Bardwell*, 72 Miss. 535, 18 So. 377; *Richburger v. State*, 90 Miss. 806, 44 So. 772.

It follows from the foregoing views that the court below committed no error in sustaining the demurrer to the indictment.

Affirmed.

EX PARTE JONES.

[72 South. 845.]

1. CONSTITUTIONAL LAW. *Initiative and referendum amendment retroactive application. Habeas corpus. Appeal. Scope of review.*

Under well-established rules of construction, the initiative and referendum amendment inserted in the Constitution by resolution adopted by the legislature March 29, 1916 (Laws 1916, chapter 159), should not be held to apply to statutes passed prior to its insertion in the Constitution, unless the words thereof admit of no other meaning and since section 3 of the amendment is incapable of having any except a prospective operation, being manifestly designed to apply to statutes thereafter enacted, chapter 103, Laws 1916, being passed prior to the insertion of such amendment is not affected thereby but continued in force from the date of its passage and will so continue until repealed by the legislature.

2. HABEAS CORPUS. *Appeal. Scope of review.*

On an appeal by a petitioner for *habeas corpus* from a judgment declining to discharge him from custody, where the initiative and referendum amendment can have no effect upon the law under which appellant was convicted, its validity *vel non* is of no concern to him and the supreme court is not called upon to express an opinion relative thereto.

APPEAL from the circuit court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Habeas corpus proceeding on behalf of Sam Jones against Sam Nunnery, Chief of Police of the city of Jackson. From a judgment declining to discharge him from custody, Jones appeals.

Appellant was convicted of a violation of chapter 103, Laws 1916, being an act to restrict the traffic in intoxicating liquor and to limit the amount which may be ordered or held by a person within a given time. He instituted *habeas corpus* proceedings, and, upon being denied his liberty, he appeals.

Vardaman & Vardaman, for appellant.

Wm. Memingway, L. C. Hallam and W. E. Morse, for appellee.

SMITH, C. J., delivered the opinion of the court.

This is a *habeas corpus* proceeding in which an appeal has been prosecuted from the judgment of the court below declining to discharge appellant from custody.

It appears from the agreed statement of facts that appellant was convicted, in the court of Hon. Luther Manship, police justice of the city of Jackson, for one of the misdemeanors defined by chapter 103, Laws 1916; all offenses punishable as misdemeanors under the laws of the state having been made offenses against the city of Jackson by an ordinance adopted by the city prior to the passage of the statute. It further appears from this agreed statement of facts that:

“Prior to the conviction of appellant a petition which complied in all respects with the requirements therefor had been filed with the secretary of state, praying that chapter 103, Laws 1916, be submitted to the electors of the state for ratification or rejection unnder the initiative and referendum amendment to the Constitution, which appears in the Laws of 1916 as chapter 159.”

Chapter 103, Laws 1916, was approved by the governor on the 16th day of February, 1916, and the initiative and referendum amendment was inserted in the Constitution by resolution adopted by the legislature on the 29th of March, 1916.

The ground upon which it is sought to avoid appellant's conviction is that, upon the filing with the secretary of state of this petition, chapter 103 of the Laws of 1916 became inoperative, and must remain in abeyance until the vote thereon is taken at the approaching election, because of a provision in the initi-

ative and referendum amendment to the Constitution that all measures referred to a vote of the people by referendum petitions shall remain in abeyance until such vote is taken.

The contentions of counsel for the city are: First, that the provisions of the initiative and referendum amendment to the Constitution have no application to statutes passed prior to the time it was inserted in the Constitution; and, if mistaken in this, second, that the amendment itself is no part of the Constitution, being void for reasons not here necessary to set forth.

Under well-established rules of construction, the constitutional amendment here under consideration should not be held to apply to statutes passed prior to its insertion in the Constitution, unless the (words) thereof admit of no other meaning; and when we examine the amendment we find not only that it contains no words indicating that it applies to such statutes, but, on the contrary, that at least one of its provisions—section 3 thereof—is incapable of having any except a prospective operation, being manifestly designed to apply to statutes thereafter enacted. We hold, therefore, that the initiative and referendum has no application to statutes enacted prior to its insertion in the Constitution, that chapter 103, Laws 1916, is in full force and effect, has been since the date fixed by its enforcing clause, and will continue so to be until repealed by the legislature.

Since the initiative and referendum amendment can have no effect upon the law under which appellant was convicted, its validity *vel non* is of no concern to him; consequently we are not called upon to express an opinion relative thereto.

Affirmed.

FISHER v. PACIFIC MUT. LIFE INS. Co.

[72 South. 846.]

1. **APPEARANCE.** *Special appearance. Plea to jurisdiction. Statute. Injunction. Notice of writ. Necessity. Injunction against suit in another state. Courts. Comity. Judgment. Collateral attack.*

Under Code 1906, section 3946, so providing when a defendant appeared for the purpose of pleading to the jurisdiction of the court it then and there entered its appearance for all purposes, and by such action was only entitled to a continuance of the suit to the next term of court upon its motion.

2. **INJUNCTION.** *Notice of writ. Necessity.*

Where plaintiff demurred to defendant's plea in abatement that plaintiff was barred by injunction in another state from suing him, by such demurrer plaintiff admits the existence of the injunction and it was his duty to obey it, irrespective of official notice thereof.

3. **SAME.**

If plaintiff did not know of the existence of the injunction until he filed his demurrer to such plea in abatement he will be presumed to have had knowledge of same at least from the time he filed his demurrer.

4. **SAME.**

For an injunction to be binding it is not necessary that the defendant be served with the writ or otherwise officially notified of its existence. It is sufficient if he has received actual notice that an injunction has been issued against him.

5. **INJUNCTION AGAINST SUITS IN ANOTHER STATE.**

A citizen of one state may be enjoined from prosecuting an action against another citizen of the same state in a foreign jurisdiction for the purpose of evading the law of his own state and this rule applies, although the suit enjoined has been commenced in another state before the injunction issues.

6. **SAME.**

The rule, to the effect that a citizen of one state may be enjoined from prosecuting an action against another citizen of the same state applies equally when an injunction is sought to restrain a citizen of one state from prosecuting an action against a non-resident corporation doing business with lawful authority in such state.

7. *COURTS. Comity. Injunction. Suits in another state.*

Upon principles of comity, so long as an injunction issued by a court of another state against a citizen thereof, forbidding him to sue in other states remains in force, he will not be permitted to sue in the courts of this state.

8. *JUDGMENT. Collateral attack. Injunction.*

Where there is set up as a defense to an action, an injunction by a court of plaintiff's residence restraining him from suing defendant elsewhere than in that state, the correctness of such injunction decree cannot be questioned in such action.

APPEAL from the circuit court of Pearl River county.

HON. A. E. WEATHERSBY, Judge.

Suit by Dr. J. B. Fisher against the Pacific Mutual Insurance Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

W. A. Shipman, for appellant.

G. T. Fitshugh, for appellee.

POTTER, J., delivered the opinion of the court.

This is an appeal from a judgment of the circuit court of Pearl River county dismissing appellant's suit. The appellant, plaintiff in the court below, filed his suit against appellee, defendant there, seeking to recover as beneficiary in a life and accident insurance policy alleged to have been issued to the plaintiff's late wife whom the declaration avers died as a result of accidental injuries received while she was a passenger on a street car in Memphis, Tenn., in the year 1906.

The defendant filed two pleas in abatement. The first plea in abatement sets out that all the parties in interest resided in Tennessee or were doing business in Tennessee, and that the contract sued on was made in Tennessee; that the accident upon which the suit is based occurred in Tennessee; and that there is no outstanding obligation in the state of Mississippi. Where-

fore the plea avers that service of process served on it in the manner provided by law for serving process on the insurance commissioner for nonresident insurance companies was not sufficient to subject the defendant in this case to the jurisdiction of the circuit court of Pearl River county. A demurrer was interposed to this plea, and was overruled. This was error, and that regardless of whether the summons served on the insurance commissioner was sufficient to bring the defendant into court or not, for the reason that under section 3946 of the Code of 1906 when appellee appeared for the purpose of pleading to the jurisdiction of the court it then and there entered its appearance for all purposes, and by such action was only entitled to a continuance of the suit to the next term of court upon its motion. *I. C. R. R. Co. v. Swanson*, 92 Miss. 485, 46 So. 83; *Standard Oil Co. v. State*, 107 Miss. 377, 65 So. 468.

The second plea in abatement alleged that the plaintiff since the commencement of this suit had been enjoined from its further prosecution by the chancery court of Shelby county, Tenn., the place where the plaintiff resided. This plea sets out that the plaintiff is a citizen of Shelby county, Tenn., was a citizen of said state and county when the policy in question was issued, and has resided there since that date, and that his wife, Mrs. Lula A. Fisher, to whom the policy in question was issued, was also a citizen of Shelby county, Tenn., at the time said policy was written, and continued to reside there until her death in 1906; that the defendant company, though a nonresident corporation, is permitted to do business in Shelby county, Tenn., and is engaged in business there and has been so engaged since said policy was issued; that a suit had been brought by the plaintiff in this case against this defendant on the same cause of action, and that the identical matter here in controversy has been litigated for about six years in the courts of Tennessee, and was

in litigation there until the date of the beginning of the present suit when the plaintiff herein voluntarily dismissed his suit in Tennessee; and that this suit was brought to harass and annoy defendant and to extort a compromise, and the plea sought a dismissal on the ground that to permit the plaintiff to continue to prosecute the present suit while the injunction against him proceeding therein was still in force in his own state would be in violation of interstate comity. To this plea a demurrer was filed, putting in issue the legal sufficiency of the defense set up by the second plea in abatement. The demurrer was overruled by the court, and the plaintiff's suit dismissed.

The appellant urges in this case that he was not bound by the injunction issued against him by the chancery court of his own state restraining him from prosecuting this suit for the reason that no writ or other sort of process had been served on him with reference to said injunction. Appellant's demurrer, however, to the second plea in abatement admits the existence of the injunction against appellant, and whether the same had ever been served on him or not if he knew the injunction existed it was his duty to obey it, and if Dr. Fisher did not know of the existence of the injunction until he filed his demurrer to the second plea of the appellee, which sets up same, he will be presumed to have had knowledge of same at least from the time he filed his demurrer to said second plea. For an injunction to be binding it is not necessary that the defendant be served with the writ or otherwise officially notified of its existence. It is sufficient if he has received actual notice that an injunction has been issued against him. *Gibson's Suits in Chancery* (2d Ed.), sec. 845; 1 *High on Injunctions*, sec. 17; *Farnsworth v. Fowler*, 1 Swan (Tenn.) 1, 55 Am. Dec. 718; *Baxter v. Washburn*, 8 Lea (Tenn.) 21; 22 Cyc. 1013.

And the rule is well established that a citizen of one state may be enjoined from prosecuting an action

against another citizen of the same state in a foreign jurisdiction for the purpose of evading the law of his own state. 22 Cyc. 814. And this rule applies, although the suit enjoined has been commenced in another state before the injunction issues. Joyce on Injunctions, vol. 1, sec. 606; High on Injunctions, vol. 1, sec. 106; Ruling Case Law, vol. 7, sec. 65, p. 1035.

It is hardly necessary to say that the above rule, to the effect that a citizen of one state may be enjoined from prosecuting an action against another citizen of the same state, applies equally when an injunction is sought to restrain a citizen of one state from prosecuting an action against a nonresident corporation doing business with lawful authority in such state.

We have no hesitation in deciding upon principles of comity that so long as the injunction remains in force issued by the chancery court of Shelby county, Tenn., against Dr. Fisher, a citizen of said jurisdiction, he will not be permitted to proceed with his suit in the courts in Mississippi. This contention is sustained by Joyce on Injunctions, vol. 1, sec. 79:

“Interstate Comity.—It has been decided by the supreme court of Wisconsin that where, in voluntary proceedings for the dissolution of a corporation of another state, a receiver is appointed by a court of that state, and the creditors are enjoined by the same court from prosecuting actions against the corporation, the Wisconsin courts will not aid a creditor so enjoined who violates the injunction by bringing an action against the corporation there resident, but will, on the contrary, in the exercise of interstate comity, pay due regard to the foreign injunction, so far as it does not conflict with the rights of the citizens of Wisconsin, and will recognize the superior right of the receiver to recover what is due from the Wisconsin resident to the corporation.”

And the same is approved by Beach in his work on Injunctions at section 79. A leading case on this ques-

tion is the case of *Gilman v. Ketcham*, 84 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, 36 Am. St. Rep. 899. The same position is taken by the supreme court of Pennsylvania in the case of *Bacon et al. v. Horne*, 123 Pa. 452, 16 Atl. 794, 2 L. R. A. 355; citing *Mulliken v. Aughinbaugh*, 1 Pen. & W. (Pa.) 117; *Speed v. May*, 17 Pa. 91, 55 Am. Dec. 540; *Law v. Mills*, 18 Pa. 185; *Moore v. Bonnell*, 31 N. J. Law, 97.

Counsel for appellant argued in his brief and in oral argument that the chancery court of Tennessee was in error in granting the writ of injunction issued at the instance of the appellee herein, but in view of the fact that the appellant is a citizen of Tennessee, and the appellee is engaged in business there, and the courts of Tennessee have full and complete jurisdiction over both the subject-matter and persons, we are of the opinion that it is not proper for this court to question the correctness of the finding of the Tennessee court, but hold that before the appellant can continue to prosecute his suit upon this cause of action in Mississippi he must obtain a dissolution of the injunction issued against the prosecution of said suit by the chancery court of Shelby county, Tenn.; and if said court was in error in issuing said injunction, he must first seek redress by an appeal to the proper appellate courts of Tennessee, for so long as said injunction remains in force it must be respected by the courts of this state.

Affirmed.

HUGHES ET AL. v. McEWEN..

[72 South. 848.]

1. **BILLS AND NOTES.** *Construction. Maturity. Conflicting clauses. Time of maturity. Reasonable time.*

Where a promissory note read, "one year after date I promise to pay" a certain sum but also providing that, "It is understood and

agreed that this note is to be paid whenever" certain land of the maker should be sold, and a deed of trust securing such note provided that, "payment of the note is not to be made until the maker of the note has sold and collected for eighty acres or more of the land." In such case the note and the deed of trust are to be construed together and such note was not payable in one year after date, but when the contingency stated happened.

2. *BILLS AND NOTES. Construction. Time of maturity. Reasonable time.*

A purchase money note payable when a given part of the land purchased should be resold by the purchaser is payable after a reasonable time has elapsed for the making of such sale.

3. *BILLS AND NOTES. Maturity. Reasonable time.*

Where such note was not paid for four years, a sale under a deed of trust securing the note will not be enjoined on testimony showing that the debtor had made some effort to sell the land, but there was no showing that exceptional circumstances prevented the making of the sale during the four years.

APPEAL from the chancery court of Pike county.

HON. R. W. CUTRER, Chancellor.

Suit by Mrs. Lelia M. McEwen against L. D. Hughes and others. From a judgment for complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

E. D. Hewitt, for appellant.

Price & Price, for appellee.

SYKES, J., delivered the opinion of the court.

The appellant L. D. Hughes, one of the defendants in the court below, on January 29, 1911, sold to Mrs. Lelia M. McEwen, the appellee in this court, a certain tract of land for a certain consideration, a part of which was paid in cash, the assumption of a deed of trust due the Union Bank, and a balance of one hundred and fifty dollars, for which a note was given by Mrs. McEwen, secured by a deed of trust on certain of the lands. The note reads as follows:

"One hundred and fifty dollars. Summit, Miss., Jan. 29th, 1911. One year after date I, we, or either of us, promise to pay to L. D. Hughes or bearer one hundred and fifty dollars for value received, with interest at the rate of ten per cent. per annum after date until paid. And in the event default is made in the payment of this note at maturity and it is placed in the hands of an attorney for collection, an additional amount of ten per cent. shall be added to the same as attorney's fees. The drawers and indorsers severally waive presentation for payment, protest and notice of protest for nonpayment of this note. Negotiable and payable at Union Bank of Pike, Summit, Miss. It is understood and agreed that this note is to be paid whenever eighty acres of land described in deed of trust to secure this paper is sold and paid for. Mrs. L. M. McEWEN."

It will be noted that the note in its beginning says that it is due one year after date, but that the last sentence in said note reads as follows:

"It is understood and agreed that this note is to be paid whenever eighty acres of land described in the deed of trust to secure this paper is sold and paid for."

The deed of trust contains this statement:

"This is a second mortgage to one held by Union Bank of Pike, and payment of note is not to be made until Mrs. McEwen has sold and collected for eighty acres or more of the land."

This note of one hundred and fifty dollars had not been satisfied on the second day of February, 1915, at which time Fred J. Martin, the trustee in the deed of trust, advertised the land for sale to satisfy this indebtedness. Mrs. McEwen filed a bill in the chancery court of Pike county seeking to enjoin the sale of the land to satisfy the note. In her bill she contends that the note is not due and will not become due until she has sold and collected the purchase money for eighty acres of this land. The chancellor issued a temporary injunction, and on the

final hearing made the same perpetual, from which judgment this appeal is prosecuted.

It is the contention of the appellant that the note is due one year after date, and that the last clause in the note simply means that if the land is sold and paid for before the expiration of one year, then the note will fall due at that time; that the certain date of payment, viz. one year after date, should control any ambiguous or uncertain clause either in the note or in the deed of trust as to the payment. The note and the deed of trust were executed at the same time, and should be considered together. While a consideration of the clause in the note alone might lead to the conclusion of the appellant, yet, when considered in connection with the clause in the deed of trust above quoted, it is quite plain that it was the intention of both parties to make the note payable after eighty acres of land had been sold and the purchase price of same paid.

The question then before the court is simply this: Construing the note and deed of trust together, there is a debt of one hundred and fifty dollars owing by the appellee to the appellant, but the payment of which is postponed to a future time and depends upon the happening of a future event, resting entirely within the discretion of the appellee, and which event the appellee may never cause to happen. In other words, taken literally, the appellee can defeat the payment of the debt due by her to the appellant by never selling the land. The debt is an absolute one, and is admitted by the appellee.

While there are some authorities to the contrary, the great weight of authority and the best-reasoned cases hold that in cases of this kind the debt becomes due absolutely within a reasonable time. In the case of *De-Wolfe v. French*, 51 Me. 420, it was held that where a debt is due absolutely, and the happening of a future event is fixed upon as a convenient time for payment merely, and the future event does not happen as con-

templated, the law implies a promise to pay within a reasonable time.

In *Sears v. Wright*, 24 Me. 278, where a note was payable—

“from the avails of the logs bought of M. M., when there is a sale made, it was held not payable upon a contingency, but absolutely, and when a reasonable time had elapsed to make sale of the logs, and that it was the duty of the maker to sell them: But whether it be logs to be sold or a farm can make no difference. The maker of the note is to make sale within a reasonable time to enable him to discharge his indebtedness.”

The case of *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687, is a case where there was a promise to pay two hundred dollars when a farm was sold. In that case the court held that the debt was due absolutely within a reasonable time. In the case at bar it will be noted that there was no provision to pay the one hundred and fifty dollars out of any particular fund, but it was a promise to pay absolutely when the land was sold and the proceeds of sale collected. The case of *Noland v. Bull*, decided by the supreme court of Oregon and reported in 24 Or. 479, 33 Pac. 983, is one where the plaintiff sold and conveyed to the defendant certain real property known as the Stephens ranch for an agreed price of two thousand dollars, of which one thousand, five hundred dollars was paid in cash, and the balance of five hundred dollars was to be paid when the defendant sold the said ranch. After waiting seven years the plaintiff brought suit, and that court held that the agreement was in effect to pay the five hundred dollars within a reasonable time, and that the seven years which had elapsed prior to the commencement of the suit constituted a reasonable time. The court in part says:

“The five hundred dollars was an existing indebtedness at the time the agreement was executed by the defendant and accepted by the plaintiff, the effect of which agreement was to postpone or defer the time of payment

of an already due and existing debt to an uncertain date depending upon the accomplishment of a specified transaction, viz., the sale of the Stephens ranch at a price mentioned. Where there is a present debt then due, constituting the basis of an agreement, which merely postpones the time of its payment to an uncertain future date, when a certain specified transaction shall be accomplished, the agreement is to pay within a reasonable time, whether such transaction is accomplished or not."

In the case of *Nunez v. Dautel*, 19 Wall. 562, 22 L. Ed. 161, there was an agreement "to pay as soon as the crop can be sold or the money raised from any other source." It was there held payable within a reasonable time. The court says in its opinion:

"It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice."

In the case of *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 365, the note provided for its payment ninety days after the first return trip of the schooner *Mary Bloom*. The schooner was lost at sea. The court held that the money became payable ninety days after the expiration of the period of time usually required for a return trip of the schooner. In conclusion this opinion says:

"It would be a 'mockery of justice' to hold that, because the schooner was lost at sea, and, therefore, had not made her first return trip, the appellee lost his debt."

It would be inequitable and unjust to hold that the appellee has it within her power to defeat the payment of this note by failing to make a sale of the land. It was her duty to have sold the same within a reasonable time.

The only question which remains is whether or not she had had a reasonable time to make this sale before the trustee advertised the land under the deed of trust. This note is dated the 29th day of January, 1911. The trustee

advertised the same for sale on the 2d day of February, 1915. A period of 4 years had elapsed between the date of the note and the date of the advertisement.

The testimony in the case shows that the appellee had made some effort to sell the land. There is no showing, however, that there were any exceptional circumstances which prevented her from making the sale during the above period of time. We are therefore of the opinion that the appellee has had a reasonable time within which to sell this land, and that the note was due at the time of the date of the advertisement of sale by the trustee.

It therefore follows that the judgment of the lower court is reversed, the injunction dissolved, and the bill dismissed.

Reversed.

CITY OF JACKSON v. HARLAND.

[72 South. 850.]

MUNICIPAL CORPORATIONS. *Ordinances. Appeal. Questions of law.*

Under Code 1906, section 40, paragraph 2, providing for appeals by the state or a municipality from a judgment in the circuit court acquitting the defendant, where a question of law has been decided adversely to the state or municipality, where a defendant was acquitted before the circuit court on a charge of violating a city ordinance, the case by agreement being tried before the circuit judge, who decided that the evidence "did not show the offense charged in the affidavit," and discharged the defendant, in such case the record does not present a question of law within the meaning of said code section and the city was not entitled to appeal.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

R. E. Harland was acquitted of keeping and exhibiting a gambling device contrary to an ordinance. From the judgment, the city of Jackson appeals.

This case was tried before the circuit judge, a jury being waived, on an agreed statement of facts, which is set out below, on appeal from a conviction in the municipal court on an affidavit which charged that:

The defendant, "on or about September 27, 1915, in the city limits of Jackson, did then and there willfully and unlawfully keep and exhibit a certain gambling game and device commonly called a slot machine, and which was then and there played at by divers and sundry persons to affiant unknown for money and other valuable things, in which gambling device and game and the loss and gains thereof the said Harland was then and there interested and concerned, which said slot machine, game, and device was then and there a game of chance, and was then and there kept and exhibited by said Harland for the purpose of permitting and allowing persons to so gamble therewith, and at which said persons did then and there so play and gamble, with the knowledge and at the solicitation and instigation of said Harland, contrary to the laws and ordinances in such cases made and provided."

Section 1205 of the Mississippi Code of 1906 provides as follows:

"If any person shall be guilty of keeping or exhibiting any game or gaming table commonly called A. B. C. or E. O. roulette or rowley-powley or rouquet noir, roredo, keno, monte, or any faro-bank, or other game, gaming table, or bank of the same or like kind or any other kind or description under any other name whatever, or shall be in any manner either directly or indirectly interested or concerned in any gaming tables, banks or games, either by furnishing money or articles for the purpose of carrying on the same,

being interested in the loss or gain of said table, bank or games, or employed in any manner in conducting, carrying on, or exhibiting said gaming tables, games, or banks, every person so offending and being . . . convicted, shall be fined," etc.

AGREED STATEMENT OF FACTS.

It is agreed by and between the attorneys for the city of Jackson and the defendant, R. E. Harland, that the defendant is, and has been for some years, engaged in the business of conducting a billiard hall and cigar and tobacco stand at No. ——— West Capitol street, in the city of Jackson, Miss., and that on the 27th day of September, 1915, and for some days prior thereto, he kept and exhibited in his said billiard room and cigar stand, a certain device which in its material make-up and operation is as follows: A box-shaped arrangement in the front of which was a slot into which a nickel was dropped. There was a lever on the machine, which was pressed down after the nickel was placed in the slot, and when the lever was released the machinery in the machine or device—which consisted in part of three cylinders each containing numerals from one to nine, all of which cylinders revolved in one and the same direction—would revolve, and when the revolution ceased the numbers on the three cylinders could be read by the operator and by-standers. Said device contained a drawer or receptacle (the contents of which were visible) into which every seventh nickel placed in the slot fell, and there remained until the winning number appeared on the cylinders, and each time a given number appeared on the cylinders after their revolution as aforesaid the person then operating the machine received as a prize, bonus or what not, the contents of said drawer or receptacle, the amount of which contents ranged anywhere from five cents, or one nickel, to sixteen dollars or more in nickels. For each nickel played in the slot the person playing the

machine or game was entitled to receive from the defendant the value of said nickel in merchandise, and the one who put the nickel into the slot stood the chance of getting or winning, in addition to the five cents worth of merchandise, the contents of said drawer or receptacle ranging anywhere from five cents to sixteen dollars or more in nickels. The winning of said contents of said drawer or receptacle is determined entirely by lot, luck, and chance, and no element of judgment, practice, skill, or adroitness enters therein. The defendant owned said machine or device and exhibited it in his billiard room and cigar stand aforesaid, on his showcase or counter, and was interested in the same and exhibited it for the purpose of having the public play at said game or device and for attracting trade, and on the date alleged, and for some time theretofore, many and divers persons played the same, and many and divers persons received only five cents worth of merchandise for each nickel deposited therein, and many and divers persons received not only five cents worth of merchandise for each nickel deposited therein by them, but also for each of certain nickels deposited therein won, in addition to five cents worth of merchandise, the contents of said drawer or receptacle, ranging anywhere from one nickel to sixteen dollars or more in nickels, all of which playing and winning was done at the instance, solicitation, and instigation of the defendant and in his presence and with his knowledge and consent.

It is further agreed that the defendant at the times aforesaid had paid a privilege tax to operate a slot machine under the laws of 1914 and held the receipt therefor, and, further, that all acts committed within the corporate limits of the city of Jackson amounting to a misdemeanor under the laws of the state of Mississippi are violations of the ordinances of said city.

Paragraph 2 of section 40 of the Code, providing for appeals by the state or a municipality from a judgment in the circuit court, is as follows:

“From a judgment actually acquitting the defendant where a question of law has been decided adversely to the state or municipality; but in such case the appeal shall not subject the defendant to further prosecution, nor shall the judgment of acquittal be reversed, but the supreme court shall nevertheless decide the question of law presented.”

Greaves, Potter & Hallam, for appellant.

G. Edward Williams, for appellee.

SMITH, C. J., delivered the opinion of the court.

This cause was submitted to the judge below without a jury, upon an agreed statement of facts, who, after finding that the evidence “did not show the offense charged in the affidavit,” discharged appellant.

This record does not present a question of law within the meaning of paragraph 2, section 40, Code 1906, and the right of the city to appeal is governed by *State v. Willingham*, 86 Miss. 203, 38 So. 334, and *State v. Brooks*, 102 Miss. 661, 59 So. 860, from which it follows that the appeal must be, and is, dismissed.

Dismissed.

AETNA INSURANCE COMPANY v. HEIDELBERG.

[72 South. 852-470.]

1. *INSURANCE. Validity of contract. Use of property. Household goods. Valuation. Statute. Items.*

Where a furniture dealer sold and delivered household furniture with a reservation of title to a woman who kept a house of ill fame and thereupon took out a policy of fire insurance to protect his interest in the same, and afterwards took back the furniture under his reserved title and turned it over to another party who left the property in the house in which it was insured under the care of a watchman, and the furniture was burned. In such case the contract of insurance was not vitiated by the fact that the purchaser of the furniture kept a house of ill fame, since the premium paid by the insurer as a consideration of the contract was not connected with such use of the furniture.

2. *INSURANCE. Household goods. Valuation. Statute.*

Where the contract of insurance expressly insured the property as household furniture, and the various articles had been severed from the stock of the insured and delivered to the purchaser, put in order and were actually being used as household furniture they must be so classed. In such case the valued policy law applied and the insurer having the right of inspection when the insurance was written, could not show, that the actual cash value of the property was worth less than the amount of the insurance.

3. *INSURANCE. Household goods. Valuation. Items.*

Under such contract where certain articles of furniture were sold by the insured after the taking out of the policy, directly to the purchaser to whom he had sold the rest of the furniture, after retaking it under his reserved title, and as to which no indorsement was made on the policy, so as to expressly include them, such last articles of furniture were not covered by the policy.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

On suggestion of error former opinion 72 So. 470.

McLaurin & Armistead, for appellant.

Sullivan, Conner & Sullivan, for appellee.

STEVENS, J., delivered the opinion of the court.

This case was affirmed without opinion, but in view of the earnestness and confidence with which counsel for appellant press the suggestion of error that was filed in due time, we are stating briefly the reasons that induced us to affirm the case. The appellee in this case, a retail furniture dealer, entered into a contract of insurance with appellant, whereby appellant insured appellee against all loss or damage by fire to an amount not exceeding two thousand four hundred dollars—"on their interest in the household furniture of every description, useful and ornamental, while contained in the two-story, frame, shingle building occupied by Marie Warwick as a female boarding house, situate on the east side of Dewey street of Hattiesburg, Miss. It is understood that this property is under contract of sale to Marie Warwick, title being retained by the assured until all deferred payments are made, and this policy covers only any interest that the assured may have in the property at the time of any loss or damage by fire."

Mr. Heidelberg had, in due course of business, on June 14, 1913, sold and delivered the articles covered by this policy to the said Marie Warwick, for a total consideration of two thousand six hundred and thirty dollars and seventy-five cents, and the numerous articles so sold had been delivered to and were under the control of Marie Warwick when the contract of insurance was entered into. On or about April 8, 1914, Marie Warwick having failed to pay for the goods in question, they were turned over to Heidelberg under his retained title contract, and appear to have been under Heidelberg's control from that date until about the 13th day of April, following, when they passed into the possession and under the control of one Nettie Wilson. The latter left the property in the house

formerly occupied by Marie Warwick, and the house was in the care of a servant or watchman until the 18th day of April, when the property so insured was totally destroyed by fire. The proof shows that Marie Warwick was a keeper of a house of ill fame at the time she purchased the furniture. She made certain payments on the property, reducing the amount to two thousand one hundred and seventy-five dollars and sixty-five cents. On April 13th, the day that appellee resold the property to Nettie Wilson, he notified Mr. King, the agent of appellant, of the change of ownership, and also advised Mr. King that he had sold a few additional articles of household furniture and furnishings to Nettie Wilson, the total purchase price of which was seventy-four dollars and thirty-five cents, thereby making the total balance claimed against Nettie Wilson of two thousand two hundred and fifty dollars. Appellee requested the agent to make the necessary notation on his records, and to this request Mr. King replied: "All right, I will take care of that. I will fix it all right." Mr. King is the regular local agent of the company at Hattiesburg, with authority to countersign policies, and, in fact, wrote the policy of insurance in this case.

Appellant, defendant in the court below, filed several pleas. A demurrer was interposed and sustained to the third plea, in which appellant submitted that:

"The plaintiff says that the defendant ought not to be entitled to recover anything on this contract because the purchaser or purchasers of the property in question, the subject of the insurance, and the owner of it at the time the contract of sale was made, and practically continuously thereafter until the fire, was engaged in an illegal and immoral business, to wit, she or they were the proprietresses or keepers of a house of ill fame," of which appellee had notice, etc.

This is the main point of law relied upon by counsel for a reversal of this case. Upon this question the

fact must be kept in mind that the subject of this insurance, that is, the household furniture and furnishings, were purchased by Marie Warwick on credit, some fifteen days prior to the issuance of the policy in question, and at the time the contract of insurance was written the furniture no longer constituted a part of appellee's stock of merchandise, but had been set up by Marie Warwick in her dwelling house and was being used for the purposes for which the property was adapted and purchased. It therefore constituted household furniture when Mr. Heidelberg protected his insurable interest therein. This case does not involve the right of Mr. Heidelberg to collect the purchase price of the property either from Marie Warwick or Nettie Wilson. They purchased the property and were the equitable owners thereof, while Heidelberg, in the eyes of the law, simply held the contract that gave him, not the rights of an absolute owner, but security for his debt. In obtaining the insurance, Heidelberg paid the premium of sixty dollars and the contract is one directly between Heidelberg and the insurance company. In our judgment, the illegal and immoral business conducted by the purchaser of this property cannot and does not vitiate the contract of insurance, which indemnifies the merchant and not the keeper of the house of ill fame. It is said by the supreme court of the United States, speaking through Chief Justice MARSHALL, in *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468.

"If the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act."

And:

"A new contract, founded on a new consideration, although in relation to property respecting which there

had been unlawful transactions between the parties, is not itself unlawful."

The case of *Ocean Insurance Co. v. Polleys*, 13 Pet. 157, 10 L. Ed. 105, involved a contract of insurance upon a schooner owned by Polleys and sailing under a false and fraudulent certificate of registry, in violation of the laws of the United States. It was contended that the contract of insurance was void. The supreme court, speaking through Mr. Justice STORY, overruled this contention—"upon the ground that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry, and in no respect designed to aid, assist or advance any such illegal purpose. We all know that there are cases where a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote."

The case of *Phoenix Insurance Co. v. Clay*, 101 Ga. 331, 28 S. E. 853, 65 Am. St. Rep. 307, involved a policy of insurance on a house leased by the owner to a woman of ill fame and with knowledge that the house was being used for purposes of prostitution. The court says:

"The policy was for a valuable and legal consideration and for what appears on its face to be a good and lawful purpose. It was made not to protect the business of keeping a lewd house, but to protect the property of the owner of the building. Even were the owner the person conducting this illegal business, the policy would be issued to him, not as one engaged in such business, but as the owner of the property insured; not to protect him against the consequences of the illegal business, but against accident to his property. . . . A consequence so negative in its character, so remote in its effect, is one which cannot be said in law to promote or to tend to promote the maintenance of these houses. Such policy of insurance

can be said to promote the illegal business only by failing to discourage it, to aid it only by declining to throw obstacles in its way," etc.

Our own court held in the case of *Conithan v. Insurance Co.*, 91 Miss. 386, 45 So. 361, 18 L. R. A. (N. S.) 214, 124 Am. St. Rep. 701, 15 Ann. Cas. 539, that:

"A policy of fire insurance issued to the keeper of a bawdyhouse upon furniture used therein is not void because of the unlawful business conducted there."

The court in its opinion observes:

"She could have conducted and carried on her bawdyhouse as well without the insurance policy as she could with it. The only effect of the insurance policy was that, in case her property was lost by fire, she could have an indemnity for the loss of the property; but the contract did not even remotely aid or assist her in the conduct of this business. . . . The keeping of the bawdyhouse was an independent, illegal transaction, which the insurance policy in no way aided or promoted."

If the keeper of a bawdyhouse can herself obtain a valid contract of insurance, then certainly the merchant who has a lien upon the same property should be accorded the right to protect his insurable interest. Furthermore, the proof does not show that Nettie Wilson was using the property for immoral purposes, but, on the contrary, the house in which the furniture was situated was not being occupied by Nettie Wilson at all, but was in the care of a watchman at night, and this with the full knowledge and assent of appellant's agent.

There is no merit in the contention that the property insured should not be classed as household furniture, but should be regarded as a part of appellee's stock of merchandise. The contract expressly insured the property as household furniture; the various articles had been severed from the stock, delivered to the purchaser, put in order, and were actually being used as

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household furniture, and must in fact be so classed. Our valued policy law therefore applied, and appellant was not justified in attempting to show the actual cash value of the property, or its depreciation, or the amount it would cost to replace it. Appellant had the right of inspection at the time the insurance was written, and by writing the policy in question it is concluded, under the terms of our statute, on all questions of valuation and cannot now be heard to say that the property was or is not worth the amount at which it is insured.

This record shows, however, that certain lace curtains, bedspreads, cuspidors, and other specified articles were on April 13th sold by appellee directly to Nettie Wilson, and constituted, therefore, no part of the subject of the insurance at the time the policy was executed. While the agent was requested to embrace these articles in the policy, no indorsement to this effect was in fact made, and the policy does not in terms cover these articles. Their value is shown to be seventy-four dollars and thirty-five cents. They were not originally subject to the retained title contract entered into between appellant and Mary Warwick. In affirming this case without an opinion we were, as to this item, led into error by assuming that the amount of recovery did not exceed the face of the policy, and therefore appellant has no complaint. We now think, however, that inasmuch as the proof clearly shows that these articles were sold long after the policy was written, and sold not to Marie Warwick, but to Nettie Wilson, they do not come within its protection. It is our judgment that the suggestion of error should be sustained to the extent of reducing the judgment seventy-four dollars and thirty-five cents, the allowance of which constituted error on the part of the court below. We also think the costs of the appeal should be taxed against appellee.

Suggestion of error sustained in part.

WEBB v. CITY OF VICKSBURG.

[72 South. 852.]

MUNICIPAL CORPORATIONS. Violation of ordinances. Sentence. Costs.

Where a defendant was convicted under a city ordinance of carrying concealed weapons, it was error to sentence him to "stand committed to the county farm until all costs are paid," there being no authority of law for such a sentence.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIAN, Judge.

James Webb was convicted of carrying concealed weapons under a city ordinance and appeals.

The facts are fully stated in the opinion of the court.

Theo. McKnight, for appellant.

POTTER, J., delivered the opinion of the court.

This is an appeal by the appellant, James Webb, from a conviction in the circuit court of Warren county of a misdemeanor under a municipal ordinance of the city of Vicksburg. After conviction the following sentence was imposed upon the appellant:

"It is thereupon ordered by the court that for such his offense of concealed weapons that he be fined and pay to the city of Vicksburg the sum of one hundred dollars and all costs of this prosecution, and that he serve thirty days on the city works. It is further ordered that the said defendant stand committed to the county farm until all costs are paid and then delivered to the city of Vicksburg to serve fine and imprisonment."

This was a conviction under a municipal ordinance, and we know no authority of law for imposing that part of the sentence requiring the defendant to "stand committed to the county farm until all costs are paid." This part of the sentence should be stricken out. We find no other error in record.

This case, therefore, is reversed and remanded, with directions that sentence be imposed anew in conformity with this opinion.

Reversed and remanded.

ROBERTSON v. BOARD OF SUPERVISORS OF LEFLORE COUNTY.

[72 South. 852.]

STATUTES. *Local and special acts. Highway improvements. Powers of board.*

Laws 1916, chapter 424, providing for the issuance of bonds to pay for the improvement of public roads in Leflore county does not violate section 90, paragraph L, of the state Constitution, for the reason that it does not provide for the laying out, opening, altering and working roads and highways, but for the raising of revenue with which to pay for the working of roads and highways, the method by which they have been or are to be laid out, opened, altered and worked, being governed by the general laws relating thereto.

APPEAL from the chancery court of Leflore county.

HON. JOE A. MAY, Chancellor.

Injunction by M. E. Robertson against the board of supervisors of Leflore county. From a decree dissolving a temporary injunction and dismissing the bill, complainant appeals.

The legislature on March 21, 1916, passed an act, authorizing the board of supervisors of Leflore county, Miss., to issue bonds of said county to an amount not exceeding six hundred thousand dollars for the improvement of the public roads out of stone, gravel, or other material. The board of supervisors proceeded in accordance with the authority vested in them by said act to issue such bonds when appellant filed a suit, seeking to enjoin the board from issuing or selling the bonds. It is contended that said act, being a local and private law, violates section 90 of the Constitution, which provides that:

"The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.:

"(L) Laying out, opening, altering, and working roads and highways."

There was a decree dissolving the temporary injunction and dismissing complainant's bill, from which he appeals.

Means Johnston, for appellant.

Gardner, McBee & Gardner, for appellee.

SMITH, C. J., delivered the opinion of the court.

Chapter 424, Laws of 1916, does not violate section 90, par. L of the Constitution, for the reason that it does not provide for the "laying out, opening, altering and working roads and highways," but for the raising of revenue with which to pay for the working of roads and highways, the method by which they have been or are to be laid out, opened, altered, and worked being governed by the general laws relating thereto.

Affirmed.

MOORE v. KIRKLAND.

[72 South. 855.]

1. FRAUDS, STATUTES OF. *Promise to pay debt of another. Contracts. Right of action. Promise to pay third party.*

Where R gave K an order for money, under a promise to pay M, to whom R was indebted, a part of it, such promise of K was not a promise to pay the debt of another, within the statute of frauds.

2. SAME.

In such case M could sue on the promise of K in his own name although the promise was communicated to M by R alone.

APPEAL from the circuit court of Clarke county.

HON. J. L. BUCKLEY, Judge.

Suit by J. A. Moore against J. K. Kirkland. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

J. A. Anderson and J. D. Fatheree, for appellant.

This case is analogous to *Lee v. Newman* in 55 Mississippi page 365, as in the case cited appellant was attempting to show that appellee, Kirkland, in order to obtain the order from Kervin Robinson, agreed to pay for appellant, J. A. Moore, one hundred dollars which the said Kervin Robinson was due the appellant Moore for borrowed money.

In the language of the court as in the case cited: "The main purpose and object of Kirkland, appellee, is not to answer for another, but to subserve some purpose of his own" and that purpose was to get the order from the said Kervin Robinson.

If the court had allowed the question to appellee Kirkland on cross-examination: "You did have a settlement with Kervin Robinson about two years ago?" it is likely that appellant could have elicited from the witness, Kirkland, the fact of his obligation to pay Moore one hundred dollars due him by Kervin Robinson in order to obtain from the said Kervin Robinson the order on the Robinson estate, but the court sustained appellee's objection to same and in this we think the court erred.

The appellant could have clearly shown by both the witnesses Kervin Robinson and Kearney Robinson that appellee Kirkland in order to obtain the order on the Robinson estate and in consideration of same agreed with the said Kervin Robinson to pay to the appellant Moore, the said debt of one hundred dollars due Moore by Robinson, but the court refused to allow defendant to make this proof and in this we think the court erred.

We think this case should have gone to the jury on the question as to whether appellee Kirkland obligated

himself to Robinson to pay Moore the debt of one hundred dollars.

It is a case that is clearly not within the statute of frauds.

S. H. Terral, for appellee.

This case should be affirmed. There is no contention that appellee is liable to Robinson for anything or ever was liable to him for any amount. If not liable to Robinson to whom the promise is alleged to have parted with an order, a thing of value, then certainly he is not liable to appellant, an utter stranger. Nor does the case of *Lee v. Newman*, 55 Miss. 365, have any application whatever. There it was held that a decree *in personam* could not be rendered against R. S. Newman (page 371), but only a decree against the land to enforce the vendor's lien. Here Moore is trying to recover a judgment *in personam* against Kirkland on a promise the latter is alleged to have made Robinson, a debtor of Moore. If such a promise were made it was without consideration and void and needs no citation of authorities to show that it clearly falls within the statute of frauds.

POTTER, J., delivered the opinion of the court.

Appellee sued appellant in a justice of the peace court on open account for one hundred ten dollars and thirteen cents. A judgment was recovered in the justice's court in favor of appellant, who had pleaded an offset of one hundred dollars. The appellee appealed to the circuit court, and a trial *de novo* was had, resulting in a judgment for the appellee for the amount sued for. Appellant thereupon appealed to this court, assigning as error the exclusion of evidence offered to establish his offset of one hundred dollars.

With a view of proving his right to the offset pleaded, appellant offered to show by witnesses that one Kervin Robinson was indebted to appellee to a considerable amount, and also owed appellant one hundred dollars;

that Mr. Kirkland, the appellee, asked Robinson for an order on B. H. Carter, a commissioner, who had in his possession about two hundred and sixteen dollars belonging to Robinson, to apply on said Robinson's indebtedness to him; and that thereupon Robinson stated that he owed the appellant J. A. Moore one hundred dollars, and this amount was to be paid out of the funds in the hands of the commissioner; whereupon Kirkland told Robinson that if he would give him an order for the money in question, he would settle the one hundred dollars with Moore; and that thereupon Robinson gave Kirkland an order for the money in the commissioner's hands and Kirkland collected the same. The court asked counsel for appellant if there was an understanding between Moore and Kirkland as to this transaction, and counsel answered there was not, except as communicated to Moore through Robinson.

The court held the testimony offered incompetent because within the statute of frauds, and upon objection excluded same and peremptorily instructed the jury to find for appellee.

In the case of *Lee v. Newman*, 55 Miss. 365, the court, speaking through Judge CHALMERS, said:

"Nor is an obligation to pay the debts of the vendor to a third person, though in parol, obnoxious to that provision of the statute of frauds which requires all undertakings to pay the debts of another to be in writing. Such assumptions are not within the statute. The contract is, not to pay the debts of another, but to pay the party's own debt to some person other than his own creditor. 'It may be stated as a general rule that whenever the main purpose and object of the promisor is, not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another.' 3 Pars. on Con. (5th Ed.), 24."

We think it clear, following the reasoning in the above-cited case, that the verbal promise alleged to have been made by Kirkland to Robinson to pay one hundred dollars to Moore was not within the statute of frauds.

But the question is presented as to whether or not Moore has a right to claim this offset in his own name when no promise was made by Kirkland to him. This question has also been settled in this state in the case of *Lee v. Newman, supra*. With reference to this question the court in that case said:

“Can the complainant assert, on his own behalf, this undertaking exacted by the vendor from the vendee for his benefit? It has been held from very early times, though not always without question, that where a contract not under seal is made with A. to pay B. a sum of money, B. may maintain an action in his own name; and in America it has been held that such promise is to be deemed made to the third party, if adopted by him, though he was not cognizant of it when made. In law the promise is held to be made to him to whose benefit it inures, and in pleading, it is always sufficient to declare according to the legal effect. The rule is different where the promise is under seal, because there the action must be debt or covenant, and hence must be in the name of the obligee.

“Especially will this right to bring suit in his own name exist, in behalf of him for whose benefit the promise was made, where the consideration of it was money or property simultaneously delivered or sold to the promisor. In such case the property is received under a trust, which will itself form a good consideration, inuring to the benefit of him to whom the payment is due; and, if the purchaser has received credit for the sum thus contracted to be paid to such other person, the law will treat it as money had and received to his use. 1 Chitty's Pl. 5; *Arnold v. Lyman*, 17 Mass. 400, 9 Am. Dec. 154; *Hall v. Marston*, 17 Mass. 579; 1 Cranch (append.) 429, 2 L. Ed. 164; *Barker v. Bucklin*, 2 Denio (N. Y.) 45 (43

Am. Dec. 726); *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Lawrence v. Fox*, 20 N. Y. 268; 1 Pars. on Con. (5th Ed.), 466-468."

The court erred in excluding the testimony offered by appellant to establish his offset of one hundred dollars, and in directing a verdict for the plaintiff.

Reversed and remanded.

JACKSON LIGHT & TRACTION COMPANY v. TAYLOR.

[72 South. 856.]

1. TRIAL. *Instructions. Assuming facts. Carriers. Passengers. Action. Instructions. Carrying beyond destination. Punitive damages.*

In an action for damages against a street railway company for carrying plaintiff beyond her destination, an instruction that it was the duty of defendant to keep a lookout for signals, to stop its cars at all regular crossings on the usual signal, and if the jury believed that the agents of defendant did not stop when signalled by plaintiff, but carried her beyond and did not back when requested to do so, plaintiff was entitled to recover damages suffered thereby, was erroneous in assuming that the signal was properly given and recognized.

2. SAME.

This instruction was also erroneous in placing upon the defendant the absolute duty to back its car for half a block when a passenger is carried beyond his destination.

3. PASSENGERS. *Carrying beyond destination. Punitive damages. Carriers.*

The language of defendant's conductor in refusing to back the car at the request of plaintiff's mother, when he said, "No, you will get off right here" and also his statement that he "did not have time" in a rough tone was not sufficient to constitute an insult, justifying an award of punitive damages.

4. CARRIERS. *Actions for injuries. Negligence. Punitive damages.*

Gross negligence cannot be built up by the addition of two acts of simple negligence.

112 Miss.]

Statement of the case.

5. SAME.

In order to justify the imposition of punitive damages there must be some willful or wanton wrong or such gross negligence as imputes willful disregard of plaintiff's rights.

APPEAL from the circuit court of Hinds county.

HON. E. L. BRIEN, Presiding Judge.

Suit by Ruby Taylor, by her next friend, Dick Taylor, against the Jackson Light & Traction Company. From a judgment for plaintiff, defendant appeals.

This action was instituted in the circuit court of Hinds county by Ruby Taylor, a minor of the age of ten years, suing by her next friend, to recover damages for the alleged negligence of the Jackson Light & Traction Company in carrying plaintiff beyond her destination. Appellee was allowed to recover punitive damages, and from a judgment awarding the sum of five hundred dollars appellant appeals.

The record shows that the plaintiff and another little girl by the name of Tutt were in company with plaintiff's mother, Mrs. Ada Taylor; that the three boarded one of the regular street cars of appellant at the Old Capitol station in the city of Jackson and paid three fares for their transportation north to Euclid street. According to the testimony of Mrs. Taylor, when the car was about half way from Fairview to Euclid, and half a block before they reached their destination, "the little girls gave the signal;" that this signal was given by raising the hand, and was the usual signal then employed by the company; that although they gave the signal, the car did not stop at Euclid street, but ran for half a block beyond the point where they desired to alight from the car; that when she saw they had passed the stopping place, she "got up and began walking towards the back end, and he (the conductor) spoke in this manner: 'Do you want to get off at this stop?' and I says, 'I do; will you please back up?' and he says, 'No, you will get off right here.'" She further testified that

the conductor "spoke rough;" that he refused to back the car to Euclid crossing, saying that "he didn't have time;" that the street in the middle of the block where the car actually stopped was muddy and wet, and that in getting off the car she and the little girls had to walk through the mud and water, and in doing so the plaintiff, Ruby Taylor, "got her feet wet, and it gave her a terrible bad cold." Mrs. Taylor further testified that the time of this complaint was about 12 o'clock in the day, and in the month of January of the year preceding the trial of the case, which was had at the February, 1914, term of circuit court. From this it appears that the little girl was about nine years old at the time of the alleged injury.

Ruby Taylor, as a witness in her own behalf, testified that, "I throwed up my hand and signaled;" that the conductor did not stop, but carried them about half a block beyond; that they "asked him to back back, and he says he can't do it; if you are going to get off this car, get off right here;" that she walked half a block in the mud and "it made me sick." On cross-examination she admits that she did not have to go to bed, and did not require the services of a physician.

After the introduction of these two witnesses the plaintiff rested; and the defendant thereupon introduced the conductor and motorman who were in charge of the car, and also a Mr. Johnson, a passenger, all of whom testified that the signal was not given until the Euclid street corner was reached, and that the car was promptly stopped thirty or forty feet beyond Euclid street. The testimony of the witnesses for the plaintiff and defendant directly conflicted as to when the signal was given, as well as the condition of the street at the point the car stopped. The defendant complains of the following instructions given the plaintiff:

(1) "The court instructs the jury for the plaintiff that it is the duty of the defendant company to keep a lookout for signals and to stop its cars at all regular crossings

on the usual signal being given, and if you believe from the evidence in this case that the agents of defendant in charge of the car in question did not stop at Euclid street when signaled so to do, but carried plaintiff beyond said stop, and did not back back when requested so to do, then plaintiff is entitled to recover such damages as the jury may believe from the evidence she has suffered thereby."

(2) "The court instructs the jury, for the plaintiff that if in this case you believe from the evidence that plaintiff or her mother signaled the defendant's conductor in charge of the car in question to stop at Euclid street in the usual manner, and that defendant's agents in charge of the car did not stop at said point, but carried plaintiff beyond and refused on request to back to Euclid street, and told them to get off where they were, which place was muddy, and that the conduct of the conductor in thus refusing to back his car and forcing plaintiff to alight in the mud was characterized by insult, oppression, or willful wrong, then the jury may, in addition to actual damages, if any, assess damages by way of punishment in such an amount as they may believe warranted by the evidence not to exceed the sum of two thousand dollars."

Appellant also contends that if there is any liability at all, the verdict is grossly excessive.

Wells, May & Sanders, for appellant.

Appellee's counsel undertake to justify their first instruction by arguing that it does not assume the existence of material facts at issue, or if it does, they say, "the instructions for the defendant were very ample on this point." The court will note that the instruction assumes the existence of two material facts at issue, viz: That the car was signalled to stop at Euclid street and that request was made to have the car back back to Euclid street, the language of the instruction being, "did

not stop at Euclid street when signalled so to do, but carried plaintiff beyond said stop and did not back back when requested so to do, then plaintiff is entitled to recover damages, etc." Of course this instruction should have been modified so as to carry the qualification, if the jury believed from the evidence, that the car was signalled to stop and that the request was made to have the car back up to the corner. There was direct conflict in the testimony on both these points, and the rule is too well settled in this state to admit of debate, that an instruction which assumes the existence of a material fact which is at issue, is reversible error.

The other instruction for the appellee is fatally erroneous, even if it be conceded that the case is one for the infliction of punitive damages, because it is predicated of a state of facts which is conclusively negated by the testimony. That is, the question of whether there was insult offered to the appellee.

Among the more recent cases dealing with the questions presented, are the following: In the case of *Y. & M. V. R. R. Co. v. Dyer et al.*, 59 So. 937, the judgment was reversed, among other reasons, because an instruction was given predicated on the theory of the case not supported by the testimony. The case of *Lackey v. St. Louis & S. F. R. Co.*, 59 So. 97, presents another recent case where the judgment of the court below was reversed because an instruction was given which eliminated one of the issues in the case.

The case of the *A. & V. Ry. Co. v. Cox*, 63 So. 334, illustrates the rule that a reversal is required where there is conflict in instructions, the instruction given for the plaintiff being erroneous and not cured by a correct instruction given for the defendant.

In *Newman Lumber Co. v. Dantzler*, 64 So. 931, this court reversed the judgment of the lower court, because of an instruction which submitted to the jury an issue not made by the testimony in the case.

In the case of *McNeill v. Bay Springs Bank*, 56 So. 333, this court reversed the case because of the erroneous instruction, notwithstanding a correct instruction was given for the other side, the court declaring that the instructions presented a conflict which amounted to reversible error, where there was conflict in the testimony.

The rules thus wisely announced in these several cases, are in harmony with the decisions of this court from the earliest time. Counsel cite in support of the general proposition that this was a case for punitive damages, the cases of *Railway Light & Power Co. v. Lowery*, 79 Miss. 431; *R. R. Co. v. Moreland*, 104 Miss. 312.

M. & C. R. R. Co. v. Whitfield, 44 Miss. 466, relied on by counsel, is a decision of Judge TARBELL and approves an instruction and thereby declares a rule of law, which we submit was never the law before that decision was rendered, and has not been the law at any time since, in Mississippi. The citation of this case in support of their contention perhaps illustrates, more forcibly than any argument offered by us could do, the utter absence of any real authority in justification of their contention.

The case of *R. R. Co. v. Moreland*, is so entirely different from the question we are discussing, that we are surprised that counsel should have referred to it, except as it is a case against a common carrier where punitive damages were held proper. No question was there involved as to the form of the instruction, and moreover, the facts in that case were wholly unlike the facts in this case. In that case the passenger was carried beyond her stop and requested the conductor to permit her to disembark from the train at the point at which she discovered that she had been carried beyond her station. The conductor refused to do this and forced the passenger to go to the next station, and in the colloquy with the passenger, the conductor, as the record showed, sneeringly said to the passenger, "You can sue the company." In the instant case, the plaintiff's testimony

showed that she was permitted to get off and that the conductor declined to back the car, saying to her, if you want to get off you will have to get off at this point, or words to that effect; nothing that even remotely resembles an insult.

In the Lowery case there was every element requisite to constitute a case for punitive damages. Moreover in that case the instructions were in proper form and did not seek to have the jury decide the case upon an issue not made by the testimony. Moreover did not assume the existence of facts that were at issue.

W. J. Croom, Powell & Thompson, for appellee.

Appellant complains of the following instruction granted for appellee, to wit: "The court instructs the jury for the plaintiff that it is the duty of the defendant company to keep a lookout for signals and to stop its cars at all regular crossings on the usual signal being given, and if you believe from the evidence in this case that the agents of defendant in charge of the car in question did not stop at Euclid street when signaled so to do but carried plaintiff beyond said stop, and did not back back when requested so to do, then plaintiff is entitled to recover such damages as the jury may believe from the evidence she has suffered thereby."

On the ground that it assumes the existence of a material fact that was at issue, that is that the car was signaled to stop at Euclid street, but if the court will read the instruction carefully it will find that this instruction is not subject to this objection, for after announcing the well known law that it was the duty of the conductor to keep a look out for signals for all regular crossings, it then proceeds to say: "That if the jury believes from the evidence in this case" etc., leaving the jury to decide as to whether or not the fact had been proven. In addition the instructions for the defendant were very ample on this point, appellant further objects

to the following instruction given by the lower court, to wit:

“The court instructs the jury for the plaintiff that if in this case you believe from the evidence that plaintiff or her mother signaled the defendant’s conductor in charge of the car in question to stop at Euclid street in the usual manner and that defendant’s agents in charge of the car did not stop at said point but carried plaintiff beyond and refused on request, to back to Euclid street and told them to get off where they were, which place was muddy, and that the conduct of the conductor in thus refusing to back his car and forcing plaintiff to alight in the mud was characterized by insult, oppression or wilful wrong, then the jury may in addition to actual damages, if any, assess damages by way of punishment in such an amount as they may believe warranted by the evidence not to exceed the sum of \$2,000.”

On the ground that it permits the jury to find exemplary damages, it occurs to us that if there ever was a case in which exemplary damages ought to have been imposed, this case was one of them. The defendant’s servants in charge of the car were told, when appellee boarded the car, where they wanted to stop; they were seasonably and properly signaled before arriving at the point of destination, where everything was convenient for them to alight safely without getting wet, but the conductor, disregarding all of these facts, failed to stop at the point requested, took them for half a block beyond, refused to back saying he had no time to do it, and roughly told them in a peremptory tone to get off where they were, if they were going to get off at all.

It was broad day light and the conductor could see the situation; the road had been torn up at this point, it had rained shortly before and the mud and water where they had to get off was shoe mouth deep and yet a delicate white woman and her daughter were insultingly ordered off the car in this mud and water and had to walk back for half a block in the same, there being

no sidewalk on either side which they could take because, forsooth, the conductor in charge of the car didn't want to back to their crossing and half block and lose the time necessitated to do so and which was caused by his own gross negligence. And yet it is not shown that it would not have been easy for him to have done so; it is not shown that there was any reason for his not doing so. It is not shown that the gentleman's time was very valuable, or that the business of the company could be seriously interfered with by performing this humane act.

In support of this instruction we cite the cases of *Railway, Light and Power Company v. Lowery*, 79 Miss. 431; *Railroad Company v. Moreland*, 104 Miss. 312 and *M. etc. C. R. R. Co. v. Whitfield*, 44 Miss. 466.

The appellant also complains that the verdict is excessive. Now if a public carrier can deal with its passengers as if they were a lot of hogs, wilfully refuse to carry out its contract, wilfully refuse to obey even its own regulations and ruthlessly and insultingly order its passengers off its cars into mud and water without any sort of an excuse, for the same, then the verdict must be excessive, otherwise, we are astounded at their moderation.

STEVENS, J., delivered the opinion of the court.

Instruction No. 1, in our opinion, was erroneous in two particulars. In the first place, it assumes that the signal was properly given, and the conductor recognized or "caught" it. In the second place, it authorizes a recovery for failure to back the car "when requested so to do." The only signal given as they approached Euclid street was the signal of a little girl, nine years old, and that signal was given by raising the hand. Neither of the witnesses for the plaintiff undertakes to say that the conductor saw the uplifted hand, or recognized it as a signal to stop. The evidence on this point was in

sharp conflict, and the instruction should not assume the existence of a material fact in issue. This instruction also places upon a street railway the absolute duty to back its car for half a block when a passenger is carried beyond his destination. It is unnecessary for us to say that the agents in charge of a street car should under no circumstances back the car for the purpose of allowing a passenger to disembark. We cannot, however, say, under the facts of this case, that the car should have been backed for anything like half a block when the plaintiff and her mother could have remained on the car for the other one-half block and alighted at a proper crossing. A street railway company owes some obligation to other passengers on board as well as the complaining party negligently carried beyond her destination, and certainly owes to the traveling public the duty of operating its cars on schedule time. If the plaintiff in this case desired to avoid the mud and water so freely and manifestly existing in the middle of the block at that time, it was more reasonable under such circumstances to go to the next corner and alight in a safer place, although compelled to walk a half block further on their trip home. But, conceding the negligence of appellant in carrying the plaintiff beyond her destination, the damages resulting from such negligence were practically, if not altogether, nominal; and this brings us to a consideration of the next instruction complained of, authorizing the jury to award exemplary damages.

The granting of this instruction constituted error. By it the jury is told that if the conduct of the conductor in refusing to back the car was characterized by insult, oppression, or willful wrong, the jury might allow damages by way of punishment. The language employed by the conductor, taken most favorably for the plaintiff, amounted to nothing more than brusqueness. The language employed could not be characterized as insulting. It was held by this court in the case of *Miss. & Tenn. R. Co. v. Gill*, 66 Miss. 39, 5 So. 393, that:

"Brusqueness on the part of a railroad conductor is not an insult for which his employers are to be punished where it amounts to no more than appears" in that record.

And again:

" . . . Mere brusqueness of the agent, not amounting to insult, is not ground, in law, for the infliction of punitive damages against his principal." *Railroad Co. v. Machine Co.*, 71 Miss. 663, 16 So. 252.

It has been expressly held, in reference to the operation of a railroad passenger train, that a refusal to back the train and allow the passenger to alight at the proper place does not—

"constitute willfulness so as to authorize the imposition of punitive damage. . . . In considering the right of one, all others are not to be forgotten. Each passenger has a right to reasonably expect that the train will be run on schedule time; each passenger may make his business arrangements predicated of that idea. The safe handling of the train may depend upon its schedule. . . . Shall these considerations of public importance all be brushed aside at the instance of one passenger whom the carrier has negligently carried by his proper destination? . . . In such case, the infliction of punitive damages would impede, and not promote, the public good." *Yazoo, etc., R. Co. v. Hardie*, 100 Miss. 132, 55 So. 42, 967, 34 L. R. A. (N. S.) 740, 742, Ann. Cas. 1914A, 323.

We recognize the fact, of course, that these observations were made with reference to the operation of steam railways, but the same principle, in our judgment, largely applies in the instant case. Can it be said to be the absolute duty of the employees operating a street car loaded with passengers to back for half a block simply to allow one passenger to alight, and that upon refusal to back, the company subjects itself to liability for exemplary damages? Will the allowance of exemplary damages in such instance promote the public good? We

are not, of course, speaking about the right to recover punitive damages for a willful or wanton disregard of plaintiff's rights, or for an insult on the part of the employee. There is no such case presented by this record. There is no showing that the conductor willfully or consciously carried the passenger beyond her destination; and the language employed when the passenger alighted is not sufficient to constitute an insult. The only point then on which plaintiff can rely for an award of punitive damages is the alleged willful refusal to back the car. The facts of this case, at best, simply show an act of simple negligence, and gross negligence cannot be built up by the addition of two acts of simple negligence; that is to say, the negligence of appellant in first carrying the passenger beyond her station, and next, the negligence in depositing the passenger at a muddy or unsafe place.

Counsel for appellee rely upon the case of *Railway L. & P. Co. v. Lowry*, 79 Miss. 431, 30 So. 634. The Lowry Case is materially different from the present case. In the former case the proof showed that Robert Lowry, a distinguished citizen of Jackson, signaled a car at its regular stopping place at the intersection of Yazoo and State streets, where there was but one pavement or crossing on which a passenger could walk without plunging into the mud; that Governor Lowry carried a heavy satchel; that the night was dark and stormy; that he duly signaled the car to stop; that the motorman saw and well understood the signal, but negligently ran his car some twenty or more feet beyond the crossing and into a very muddy place; that the conductor and Governor Lowry got into a dispute as to whether Governor Lowry should walk around the car in the mud to embark, or whether the conductor would back to the proper crossing; that the conductor willfully and arbitrarily refused to back a short distance and allow the passenger in that case to embark, but went on, leaving the passenger standing on the strip of brick pavement

which constituted the only safe and proper walking ground from which a passenger could embark at that point. Robert Lowry was a citizen in public life and well known to the employees of the railway company, and, notwithstanding the fact that the motorman saw him and understood the signal, he not only ran his car beyond and into the mud, but willfully and arbitrarily refused to back a short distance, finally deciding to leave the passenger standing where he was, and thereby requiring him to walk a long distance home on a stormy night. The facts are totally different. The passenger in that case had to be taken aboard at that crossing or left altogether. The present case involves only the simple negligence of the company in failing to deposit the passenger at the proper corner or crossing.

There being no willful or wanton wrong or such gross negligence as imputes a willful disregard of plaintiff's rights, the infliction of punitive damages constitutes error, which would necessitate a reversal of this case, aside from any other error assigned or relied upon.

Reversed and remanded.

COOK, P. J., and POTTER, J. (dissenting). We are not prepared to say that the court has erred in reversing this case. It is probable that the instructions given for the plaintiff constituted error, for which the case should be reversed. We do not think that the opinion of the court correctly states the rule, and we are unable to distinguish this case from *Railway Co. v. Lowry*, 79 Miss. 431, 30 So. 634. True Governor Lowry was a distinguished citizen, and the plaintiff in this case was not, but it is also true that the evidence in this case for the plaintiff warranted the belief that the conductor stubbornly and for no reason at all refused to back the car to the crossing.

The evidence for plaintiff shows that the conductor negligently refused to stop when signaled—and then, for

112 Miss.]

Opinion of the court.

no conceivable reason, declined to make amends for his wrong.

Under the circumstances, deducible from plaintiff's evidence, the failure to back the car was a wanton disregard of a duty owing to the plaintiff.

FINCH v. DOBBS.

[72 South. 858.]

JUDGMENT. *Res adjudicata. Parties bound. Successor of state land commissioner.*

Where the state land commissioner was perpetually enjoined by a court of competent jurisdiction of the subject-matter and of the person, from conveying to any person other than complainant the swamp land title of the state to certain land, such decree bound his successor and those claiming under such successor and prevented such successor from making the conveyance so enjoined although the decree itself was erroneous and although it was not *res adjudicata* of the rights of the state.

APPEAL from the chancery court of Boliver county.

HON. M. E. DENTON, Chancellor.

Suit by Mrs. Ruth Dobbs against Parley Finch. From a decree for complainant, respondent appeals.

The facts are fully stated in the opinion of the court.

Sykes & Sykes and *Mayes & Mayes*, for appellant.

Wells, May & Sanders, for appellee.

COOK, P. J., delivered the opinion of the court.

Appellee filed her bill in the chancery court of Bolivar county against the appellant, praying that her title to the land in controversy be confirmed. Appellee claims

by a deed from the state land commissioner, executed August 1, 1913. It is agreed that the land involved is swamp and overflowed land. Appellant claims through a sale for alleged delinquent taxes due to the Liquidating Levee Board and for alleged delinquent taxes due to the state. Inasmuch as we will treat the title of appellant as perfect, provided the land was subject to taxation, and inasmuch as the land was clearly not taxable, we will not go into a discussion of the numerous points so ably presented by counsel on both sides of this appeal.

The land was swamp and overflowed land and was not the subject of taxation, but the record discloses that appellant's predecessors in title on April 17, 1906, filed a bill in the chancery court of Hinds county praying for a decree confirming their tax title to the land in controversy, and the then land commissioner, E. H. Nall, was made a party to that action, and appeared and demurred to the bill. The demurrer was overruled, and the land commissioner declined to answer the bill.

It is not necessary to set out the details of this litigation; it is only necessary to say that a court of competent jurisdiction of the subject-matter and the person entered a decree against the land commissioner confirming the tax title of appellant's predecessors in title, and also decreeing that the swamp and overflowed land patent issued to the state by the United States inured to the complainants in that suit and vested the title so obtained by the state in the complainants. More than that, the court sustained the prayer for an injunction against the land commissioner, and entered a decree perpetually enjoining the land commissioner from conveying the swamp land title of the state to any person. It is agreed that appellee had actual knowledge of these proceedings and of the decree before she purchased the land from the state.

So, as the case stands, we are not called on to decide but one thing—will the court permit the land commis-

sioner to make a deed which a court of competent jurisdiction has enjoined his predecessor in office not to make?

That neglect or omission of public officers as to their public duties will not work an estoppel against the state may be readily conceded, but it must be conceded that a state department may be controlled in the exercise of its departmental powers, and in this case the chancery court has undertaken to control the land commissioner in the exercise of his departmental powers. For the purpose of this opinion we will assume that the chancery court was wrong in its conclusions—that the land in controversy was not the subject of taxation, and the complainants in that case had no shadow of right to the decree they obtained confirming their title as against the state's title. This decree was not *res adjudicata* of the rights of the state, but we hold that it was *res adjudicata* so far as the land commissioner's power to make a deed to the land is concerned. This decree enjoining the land commissioner from conveying the land to any other person stands unchallenged, and it cannot be challenged in this suit.

Until the decree is reversed, or until it is set aside by some direct proceeding begun and prosecuted for that purpose, we believe that the orderly administration of the law and the upholding of the powers and authority of the courts constitutionally exercised compels this court to hold that the appellee cannot invoke the power of the court to validate a title obtained from an officer of the state in total disregard and in defiance of the decree of a court fully clothed with the power to make the decree.

If Mr. Brown, the present land commissioner, is concluded by judgments against his predecessor, Mr. Nall, he has ignored the decree enjoining him from executing the deed upon which is based appellee's claim to the land. From our examination of the authorities, and from principle, we are convinced that the decree rendered against Mr. Nall is as binding upon Mr. Brown as it was

on Mr. Nall. Black on Judgments (2d Ed.), vol. 2, sec. 582.

Appellee knew that Mr. Brown violated the injunction when he accepted her money and made her deed. She took a long shot and loses.

Reversed and remanded.

WELLS v. STATE.

[72 South. 859.]

CRIMINAL LAW. *Appeal. Credibility of witnesses.*

It was the province of the jury to pass upon the credibility of witnesses and the discrepancies in their testimony given at one trial and then at another. It is not for the supreme court to say that witnesses were unworthy of belief.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

John Wells was convicted and appeals.

The facts are fully stated in the opinion of the court.

W. E. Mollison, for appellant.

Ross Collins, Attorney-General, for the state.

COOK, P. J., delivered the opinion of the court.

This case has been before us before, and was reversed and remanded for retrial. 70 So. 452. The same reasons for reversal given by the court before are again urged for a reversal.

The state has repaired its fences, using the same witnesses who testified on the former trial to close up the breaks in the line. As the record now stands, the identity

of the murderer is established by the dying declaration of the murdered man, supplemented by the testimony of other witnesses who also testified at the former trial, who put up the gaps in their testimony. The defendant shifted his base a little too. From the record now before us we think the jury was warranted in finding the appellant guilty.

It was peculiarly the province of the jury to pass upon the credibility of the witnesses and the discrepancies in their testimony given on the former trial and their testimony in the present trial.

It is not for us to say that the witnesses were unworthy of belief. We find no errors of law, and the judgment of the trial court will be affirmed.

Affirmed.

MARIS v. LEVY ET AL.

[72 South. 860.]

CHATTEL MORTGAGE. *Trust deeds. Liability of third persons.*

Under the facts set out in this case the court held that the question of liability of defendant was a question for the jury.

APPEAL from the circuit court of Madison county.

HON. ROBERT POWELL, Special Judge.

Suit by C. T. Maris against D. & L. K. Levy. From a judgment on peremptory instruction for defendants, plaintiff appeals.

One Mose Hawkins, tenant of appellant, gave him a note secured by deed of trust, covering all crops grown on appellant's place as security for certain money owing by Hawkins to appellant. Thereafter Hawkins gave appellee a deed of trust on all crops raised by him to se-

cure certain advances. According to the testimony of witness Finney, who was manager of appellant's plantation, Hawkins carried his cotton to town without paying the balance due on the note held by appellant, and the next day witness missed the cotton and came to town to try and locate it, and went to the office of certain cotton buyers in Canton, Miss. He testified that he met one of the members of the appellee's firm, who advised him that they had the cotton and would hold it until the controversy was settled. The cotton was afterwards sold by Hawkins to Lewis, another cotton buyer, and the proceeds of the sale turned over to appellees by Hawkins. Appellees then turned one-fourth of the proceeds over to appellant as rent, and declined to pay over the balance to be credited on the note held by appellant, and suit was brought for same. Appellant claims that since appellees knew of the appellant's claim to the cotton under the deed of trust, and since they received the proceeds of this sale with such knowledge, they were participants in the sale of the Hawkins' cotton, and that, having received the proceeds thereof with knowledge of appellant's prior claim, they became liable to appellant for such proceeds. The court below gave a peremptory instruction to find for appellees, and this appeal is prosecuted.

H. T. Huber and *H. B. Greaves*, for appellant.

W. H. & R. H. Powell, for appellees.

STEVENS, J., delivered the opinion of the court.

The testimony for the plaintiff in this case was sufficient to justify a submission of the issue to the jury. It is the positive testimony of the witness Finney that the cotton left Hawkins' farm at one time or on one day, and that the following day this witness "missed it and came to see what he had done with it;" that he went to the office of the cotton buyers in Canton, and in going there met

one member of appellees' firm, who admitted that he had the cotton and would hold it until the controversy was settled. The testimony further shows that appellees received the proceeds of the sale of the cotton. The granting to the appellees of the peremptory instruction, therefore, was error, necessitating a reversal of this case.

Reversed and remanded.

WELCH v. HANNIE.

[72 South. 861.]

1. JUSTICE OF THE PEACE. *Review. Presumptions. Costs. Security. Waiver. Jurisdiction. Default. Judgment. Validity. Damages. Writ of inquiry. Execution. Injunction. Appeal.*

In a suit before a justice of the peace where the defendant made a motion for security for cost and plaintiff's attorney stated that he would be responsible for the cost and no further action was taken upon the motion, and judgment was entered for plaintiff, on appeal to the supreme court from a decree enjoining execution on the judgment, that court will presume that the statement of counsel was accepted by defendant.

2. SAME.

In such case it was the duty of defendant if he so desired, to have the court to pass upon his motion for security for cost and his failure to do so was a waiver of his rights.

3. JUSTICE OF THE PEACE. *Jurisdiction. Default judgment. Validity.*

A judgment by default in an action before a justice was not rendered void because while it was pending he suspended business in his court room to sit as one of the committing justices for an alleged crime occurring in his district, though by agreement the committing trial was had in another district.

4. JUSTICE OF THE PEACE. *Judgment. Default. Validity.*

When in an action before a justice of the peace, it was agreed that the case could not be tried until Wednesday afternoon this

did not amount to an agreement to try the case in vacation, and the court being in session on Wednesday afternoon, the justice had full and complete jurisdiction to dispose of it at that time or not, and it being the duty of defendant to have informed himself that the term was still in session and to have ascertained what would be done with his case, a default judgment rendered on Thursday morning when the case was reached in due course was not void.

5. JUSTICE OF THE PEACE. *Judgment. Validity.*

In a suit before a justice of the peace for unliquidated damages, the irregular introduction of plaintiff's testimony by statement of his counsel that the testimony was the same as in a previous trial and the justice being judge both of law and the facts, the failure to introduce testimony as to the amount of damages, were defects which rendered a default judgment irregular and voidable, but not void, and the irregularity can only be taken advantage of by appeal or writ of *certiorari*.

6. DAMAGES.. *Writ of inquiry.*

In an *ex delicto* case there is no necessity for the issuing of a writ of inquiry in a trial before a justice of the peace because under our law, unless a jury is called for, the justice of the peace passes upon the question of liability, and at the same time upon the question of the amount of damages, and it is only necessary when judgment is taken by default to introduce testimony as to the damages.

7. EXECUTION. *Injunction.*

An injunction should not be granted by the chancery court to prevent the issuing of an execution based upon a judgment at law unless the facts show the clearest and strongest reasons for the interposition of the courts of chancery.

8. JUSTICE OF THE PEACE. *Appeal. Time of taking.*

Since in our state there is no such thing as a justice of the peace having the right to grant a new trial, the defendant against whom judgment by default is rendered should perfect his appeal within the time allowed by law after the rendition of the judgment.

9. EXECUTION. *Injunction. Default judgment. Pleading and proof.*

Before a court of chancery will take jurisdiction to enjoin an execution based upon a default judgment at law, the complainant must allege in his bill and prove, if the fact be denied, that he has a good and meritorious defense to the action at law. It is incumbent upon the complainant to set out in his bill, and also prove the fact showing such defense. It is not enough that he merely allege the conclusion of law of such defense.

APPEAL from the chancery court of Hinds county.
HON. O. B. TAYLOR, Chancellor.

Suit for injunction by J. G. Hannie against C. Welch.
From a decree for complainant, defendant appeals.
The facts are fully stated in the opinion of the court.
Louis C. Hallam, for appellant.

Alexander & Alexander, for appellee.

SYKES, J., delivered the opinion of the court.

The appellant, C. Welch, on or about the 19th day of March, 1915, filed a suit against J. G. Hannie, appellee, in the court of F. M. Featherston, justice of the peace of supervisor's district No. 1 of Hinds county, for damages for assault and battery and actionable words in the sum of two hundred dollars. On April 6th there was a trial had before a jury resulting in a mistrial. The case was then continued to the next regular court day, which was Tuesday, April 20th. A day or two before the regular court day Mr. Hannie called the justice of the peace over the telephone and stated that he would have to be absent from Jackson on the 20th inst., and requested that his case be not tried on that day. The justice of the peace told Mr. Hannie that he had a large docket, and it would be impossible for his case to be reached before Wednesday, the 21st, and that for that reason he would not call his case before that time. There was also an agreement between attorneys representing both parties that the case would not be called before Wednesday, April 21st. The business before the justice of the peace kept his court open all day Tuesday, and on Wednesday, the 21st, in the discharge of his duties, he was called upon to sit as one of the magistrates in a committing trial for an alleged murder committed in his justice of the peace district. For the convenience of all parties this preliminary hearing was held in the circuit court room. For this trial the justice of the peace went from his

courtroom in district No. 1, across Capitol street, in the city of Jackson, to the courthouse, which is in district No. 2, and is about one city block from the office of the justice of the peace. The justice of the peace was kept busy in this committing trial all day Wednesday. Wednesday afternoon he had the deputy sheriff to go over to his office and state to all parties having business in his court that the same would be continued until Thursday morning. During Wednesday afternoon the plaintiff and his counsel and the counsel for the defendant were in the courtroom on several different occasions. There was also an attempt to settle the case between counsel, which resulted in nothing. The defendant, Mr. Hannie, was not present Wednesday afternoon, and his counsel attempted to agree upon a continuance with counsel for plaintiff. The plaintiff, however, himself insisted upon a trial of his case whenever it could be reached, and his counsel so informed counsel for defendant. At 9 o'clock Thursday morning the justice of the peace resumed the pending business of his court, and about that time the plaintiff appeared and demanded a trial. Neither the defendant nor his counsel were present in court. The case was then taken up by the justice of the peace, and the attorney for plaintiff announced to the justice that the plaintiff's evidence was the same as that introduced at the first trial. Whereupon the justice of the peace stated that he remembered the evidence, and that he would give judgment for the plaintiff in the sum of two hundred dollars. The judgment reads as follows:

"This cause having been tried at a former court day of this court, when a mistrial was entered, and having been continued from Tuesday, April 20, 1915, the next succeeding civil court day of this court after said mistrial was had, the business of the court requiring that the court should be held from day to day, and the same having been continued to the next day, April 21, 1915, at the request of the defendant and by agreement,

and on April 21, 1915, the business of the court still requiring it, the court ordered that this cause be, and the same was, continued to the next day, April 22, 1915, at 9 o'clock a. m., and at that time, to wit, at 9 o'clock a. m., came the plaintiff in his own proper person and by attorney, and announcing ready for trial, the defendant, J. G. Hannie, being called in open court, answered not, but wholly made default, it was therefore on motion of plaintiff, judgment is rendered against defendant by default; and, this being an action in tort for damages, the court thereupon issued a writ of inquiry to assess the damages, and the same having been executed, the court, having heard the evidence adduced by the plaintiff is of the opinion that said damages should be, and the same are hereby, assessed at the sum of two hundred dollars. It is therefore by this court ordered and adjudged that the plaintiff, C. Welch, do have and recover of and from the defendant J. G. Hannie, the full sum of two hundred and all costs of court for all of which let execution issue."

The defendant filed a motion for a new trial, which motion was taken under advisement by the justice of the peace and by him overruled on May 5, 1915, or over ten days after the rendition of the judgment. An appeal bond was immediately filed and approved by the justice of the peace, and a transcript of the record certified to the circuit court.

The plaintiff, Welch, shortly after the rendition of the judgment, procured an abstract of it, and had the same enrolled in the office of the circuit court clerk, and had the clerk issue execution thereon.

The defendant, Mr. Hannie, then filed a bill in the chancery court of Hinds county against Mr. Welch praying that Welch be enjoined from having an execution issue on this judgment, and praying also for a temporary injunction pending the hearing of the case. A temporary injunction was granted, and on final hearing the same was made perpetual by the chan-

cellor, from which judgment or decree this appeal is prosecuted.

The petition alleges that the judgment against the appellee, Hannie, is absolutely void, and assigns therefor, first, that the plaintiff's case should have been dismissed by the justice of the peace of his own volition, because plaintiff failed to give security for costs in accordance with the motion filed by the defendant. The facts as to this motion have not been set out above, and are in brief as follows: A motion for security for costs was duly made by the defendant, and when it was called in court one of the counsel for the plaintiff stated that he would be responsible for the costs, whereupon no further action was taken upon the same. This court therefore presumes that this statement of counsel was accepted by the defendant. It was the duty of the defendant, if he so desired, to have the court pass upon this motion, and his failure to do so constituted a waiver of his rights under it.

It is next contended that the judgment is void because the justice of the peace suspended the pending business in his courtroom in district No. 1 and sat as one of the committing justices in the courthouse, which is situated in district No. 2. The facts are, however, that the alleged crime occurred in districe No. 1, and that this was regular business before this justice of the peace coming up at this time in his court. No complaint whatever could be made if the justice had tried this case in his district, and it makes no difference to this complainant whether the trial took place in district No. 1 or by agreement in district No. 2, since it was regular business before this justice of the peace.

It is also contended that the judgment is void because the case had been set by agreement for Wednesday, April 21. Counsel for complainant contend that this was an agreement to set and try the case in vacation. However, they are mistaken as to the extent of the agreement. There was nothing whatever said either

between the justice of the peace and the defendant, Hannie, as to whether the case would be tried in term time or in vacation, except the inference from the statement of the justice, nor between the two counsel for plaintiff and defendant, who agreed on the trial of the case for Wednesday afternoon. The effect of the agreement was simply that the case could not be tried before Wednesday afternoon. When Wednesday afternoon came it so happened that the regular court of the justice of the peace was in session, and he then had full and complete jurisdiction to dispose of the case at this term or not, just as he saw fit. It was the duty of the defendant to have informed himself that this term of the court was still in session, and to have ascertained what would be done with his case.

It is next contended that the judgment is void because it is a suit for unliquidated damages, and that there was no writ of inquiry issued by the justice of the peace to assess these damages, and no testimony introduced as to the amount of the same.

The testimony in this case shows that on Wednesday, the day on which the case was set for trial in the justice of the peace court, the defendant's counsel notified the justice of the peace that he wanted a jury to try the case. On Thursday morning, however, neither the defendant nor his counsel appeared in court; consequently there was no reason or necessity for the justice of the peace to impanel a jury. Upon the statement of counsel for the plaintiff that the testimony he had to offer was the same as that offered in the previous trial, the justice replied that he remembered the testimony perfectly, and would render judgment for the plaintiff. It is true that this is an informal and irregular way to introduce testimony. It is also true that, in a suit for unliquidated damages being tried before a justice of the peace as both the judge of the law and the facts, testimony should be introduced as to the amount of damages. However,

these are merely defects which render the judgment irregular or voidable and not void, and which defects can only be taken advantage of by an appeal, or under certain circumstances by writ of *certiorari*. The judgment rendered in this case upon its face appears entirely regular. In an *ex delicto* case there is no necessity for the issuing of a writ of inquiry in a trial before the justice of the peace, because under our law, unless a jury is called for, the justice of the peace passes upon the question of liability, and at the same time upon the question of the amount of damages, and it would be entirely unnecessary for the justice of the peace to first pass upon the question of liability, and then issue a writ of inquiry to himself to assess the amount of damages in the case. It is only necessary to introduce testimony showing the damages when the default judgment is taken. The practice in the justice of the peace court in this respect is different from that in the circuit court, and is so recognized by the statutes relating thereto. At best for the appellee, the reasons assigned in his bill, if proven, would only make the judgment irregular or erroneous, which could only be corrected by appeal.

“It is well settled that, where a court in which a judgment or decree is rendered has jurisdiction of the subject-matter and of the parties, equity has no jurisdiction to enjoin such judgment or decree for errors or irregularities in the proceedings leading thereto or in the judgment or decree itself, and it is altogether immaterial that the judgment or the decree was unjust, or that the error was such as to warrant a new trial. So it is likewise immaterial that the judgment was rendered by default.” 16 Am. & Eng. Encl. of Law (2d Ed.), p. 389.

The rule is well settled that an injunction should not be granted by the chancery court to prevent the issuing of an execution based upon a judgment at law unless

the facts show the clearest and strongest reasons for the interposition of the court of chancery.

"Applications for relief in chancery against judgments at law will at all times be viewed with close scrutiny, and an injunction to prevent the enforcement of such judgment will not be granted except upon facts which show the clearest and strongest reasons for the interposition of chancery. That court will not entertain a party seeking relief against a judgment which has been rendered against him in a court of law in consequence of his default in regard to steps which might have been successfully taken in the court of law, unless some reason founded in fraud, surprise, or some adventitious circumstances beyond the control of the party be shown to excuse such default." 16 Am. & Eng. Encl. of Law (2d Ed.), p. 374.

In our state there is no such thing as a justice of the peace having the right to grant a new trial; consequently the defendant should have perfected his appeal within the time allowed by law after the rendition of the judgment; *Morris v. Shryock & Rowland*, 50 Miss. 590.

It is well settled law in this state that before a court of chancery will take jurisdiction in a matter of this character the complainant must allege in his bill and prove, if the fact be denied, that he has a good and meritorious defense to the action at law. It is incumbent upon the complainant to set out in his bill, and also to prove, the facts showing such defense. It is not enough that he merely allege the conclusion of law of such defense. *Newman v. Taylor*, 69 Miss. 670, 13 So. 831; *Stewart v. Brooks*, 62 Miss. 492; *Walker-Durr Co. v. Mitchell*, 97 Miss. 231, 52 So. 583; 16 Am. & Eng. Encl. of Law (2d Ed.), p. 386.

In the petition of complainant he alleged the conclusion of law that he had a good and meritorious defense to the action at law, but he failed to state any facts showing what this defense was. The answer of

defendant put in issue this proposition. In his testimony the attorney of complainant merely stated that the complainant had a good and meritorious defense to the action at law, but failed to state the facts showing what this defense consisted of. This was but a legal conclusion of the attorney, and was not admissible as testimony. We therefore conclude that the plaintiff failed to allege and prove the essential fact, viz: that he had a good and meritorious defense to the action at law.

The decree of the lower court is reversed, the injunction dissolved, and the bill dismissed.

Reversed.

POTTER, J., being disqualified, took no part in this decision. By agreement, SYKES, J., sat with Division B.

POWER, SECRETARY OF STATE, v. RATLIFF ET AL.
SAME v. CADE.

[72 South. 864.]

1. INJUNCTION. *Right to injunction. Persons entitled. Irreparable injury. Enjoining elections.*

The general rule is that an injunction will not lie to restrain the holding of an election, but there may be elections authorizing bond issues or directly affecting property rights, and if such an election is attempted to be held without authority of law, equity might well interfere.

2. INJUNCTION. *Right to injunction. Persons entitled.*

Where tax payer's objected to the submission of a legislative act to referendum vote on the ground that the constitutional amendment appearing in Laws 1914, chapter 520, providing for initiative and referendum was invalid, they do not suffer an irreparable injury entitling them to an injunction where the question is to be shortly submitted at a general election and the expense will be slight.

3. INJUNCTION. *Right to injunction. Irreparable injury.*

A game warden appointed under Laws 1916, chapter 99, cannot secure an order enjoining submission of the act to a referendum vote on the theory that he is entitled to the emoluments of his office and that a referendum of the act to the voters would work irreparable injury and on the theory that the constitutional amendment found in Laws 1914, chapter 520, providing for initiative and referendum was void for the law might be upheld by the voters, and if repealed the warden could then call in question the right of the people to nullify the act.

4. INJUNCTIONS. *Enjoining elections.*

Though the constitutional amendment found in Laws 1916, chapter 520, providing for initiative and referendum be void, a referendum election cannot be enjoined on the theory that if legislation be repealed, the repeal will be invalid, but the proper procedure is to take appropriate action to prevent the execution of any proposition voted upon, since the question of the validity of legislation is not one for the courts until the legislation is completed and until then the courts cannot determine whether the proper forms have been pursued.

5. SAME.

Not only should equity refrain from interfering with the preliminary steps in the holding of an election on purely political matters, but should also refrain from interfering with the free exercise of the legislative functions of government whether attempted to be exercised by the legislators or by the people in their sovereign capacity.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Bill by W. T. Ratliff and another against Joseph W. Power, secretary of state, consolidated with a bill by J. M. Cade against the same defendant. From an order denying dissolution of a temporary injunction granted complainants, defendant appeals.

W. T. Ratliff and J. M. Sullivan, citizens of Hinds county and taxpayers of the state, appellees in one of the above-styled causes, prayed for and obtained an injunction against J. W. Powers, secretary of state, restraining him from acting upon certain petitions filed by certain electors of the state seeking to have approved by

vote of the people certain acts of the legislature known as House Bill No. 264, and House Bill No. 255, the first being an act to promote temperance, to restrict the consumption of intoxicating liquors in this state, to prevent shipments and the delivery thereof in the state, to restrict the quantity of liquor that may be received or possessed, and otherwise provide for state-wide prohibition in Mississippi; the other act being an act to promote temperance and to suppress the evils of intemperance, and to prevent liquor advertisements and the circulation of price lists, order blanks, and other matter for the purpose of inducing or securing orders for liquor, bitters, and drinks in this state. A separate and similar bill of complaint was filed by J. M. Cade, appellee herein in the other of the above-styled causes, and both cases were by agreement argued and submitted together. Without setting out the allegations of the bills of complaint in detail, it is claimed that House Concurrent Resolution No. 24, appearing as chapter 520 of the Laws of 1914, styled "A concurrent resolution proposing an amendment to section 33 of the Constitution of Mississippi providing for initiative and referendum," and inserted in the Constitution by the legislature of 1916 as Senate Concurrent Resolution No. 18, styled "A concurrent resolution to insert in the Constitution of the state of Mississippi an amendment providing for initiative and referendum," was not legally submitted and was not legally adopted as a part of the Constitution for various reasons alleged in the bill, one of which is the averment that the said amendment did not receive the necessary majority of the qualified electors voting at the general election on November 3, 1914; that the said amendment is now no part of the Constitution, and that the people of the state have no right to have referred for their approval any statute passed by the legislature; that the petitions of the electors seek to have referred to a vote of the people the liquor laws passed by the legislature of 1914, and in the bill presented by Mr. Cade, the act passed by the

legislature of 1916, chapter 99, for the conservation and protection of game and fish, providing for the department of game and fish, for the appointment of game wardens, and otherwise regulating hunting and killing of game in the state; that the secretary of state, unless restrained, will proceed unlawfully to have referred to a vote of the people the several acts of the legislature mentioned, and in doing so will incur needless and unnecessary expense, and the holding of such illegal referendum will inflict an irreparable injury upon the complainants and arouse the enmity and passions of the qualified electors of the state arrayed upon the one side or the other of the questions so presented at the election. Complainants W. T. Ratliff and J. M. Sullivan seek to maintain their joint bill as taxpayers. Mr. Cade, in addition to the claim of being a taxpayer, avers that he is the game and fish warden for Hinds county, and as such is entitled to the office and the emoluments thereof without interruption. The bills of complaint were duly answered by appellant, proof taken, and the causes submitted to the chancellor upon the pleadings, proof, and motion to dissolve the temporary injunction issued. The chancellor overruled the motion to dissolve and granted an appeal to the supreme court to settle the principles of the case. The record shows that in pursuance of the initiative and referendum amendment to the Constitution the maximum number of qualified electors petitioned for a reference of the several acts mentioned to a vote of the people; that the petitions were received and filed by the secretary of state, and this official was preparing to have a referendum on the several acts at the general election to be held on the 5th day of November of the present year when he was restrained from further action by the temporary injunction which the chancellor granted and which he declined to dissolve upon motion.

Lamar F. Easterling, Assistant Attorney-General, for appellant.

W. C. Wells, *W. M. Hemingway*, *W. E. Morse*, *W. T. Ratliff* and *L. Brame*, for appellee.

STEVENS, J. delivered the opinion of the court.

(After stating the facts as above). Lying upon the threshold of this case is the question whether equity has jurisdiction to enjoin the secretary of state from taking the steps necessary to refer the several acts of the legislature to an election by the people. While the answer denies that complainants have the right to the injunction prayed for and granted, this particular question was not stressed by counsel in the arguments before us, and we might, therefore, well preface our remarks in the language of the Oklahoma court in *McAlester v. Milwee*:

"They (counsel) are so anxious to have this court pass upon the case upon its merits that they do not wish to urge that question (jurisdiction) in this court. The court does not take that view of the matter; we think it is time enough to pass upon such important questions when they are reached in due course, with proper parties, in a proper proceeding." 31 Okl. 620, 122 Pac. 173, 40 L. R. A. (N. S.) 576.

The question of the jurisdiction of equity in this case is so serious that we do not feel justified in waiving or ignoring it. The general rule is that an injunction will not lie to restrain the holding of an election. It is not necessary to say that this rule obtains to the extent that equity will never restrain the holding of an election, for the door of the court is always open to those who seek protection in matters of property and the maintenance of civil rights or who reasonably apprehend the infliction of irreparable injury. There may be elections authorizing bond issues or directly affecting property rights, and if such an election is attempted to be held without authority of law, equity might well interfere. The cases

at bar, however, do not fall in that class. The complainants in the instant cases have obtained an injunction restraining the secretary of state from performing official duties imposed upon him by a proposed amendment inserted by the last legislature as a part of our Constitution, and thereby indirectly restraining this official from taking the necessary steps to refer the liquor laws and the game law to a vote of the people in accordance with the provisions of this initiative and referendum amendment. The very object of the suits is to prevent the holding of an election on these questions. The only property rights which complainants in one of the suits have is their interest as taxpayers. The referendum called for by the amendment sought to be held void submits for the approval of the people the laws petitioned against, and the amendment expressly provides that this approval or rejection must be registered "at the general state or congressional elections, except when the legislature shall order a special election." At the time the injunction was served these questions were being prepared for submission at the general November, 1916, election. If submitted, the questions so presented will not require the holding of an additional election, but will simply lengthen the ticket to be voted on at the regular election of this year. If appellant submits the questions to a vote of the people, the additional burden of taxation upon complainants will be the paltry sum of a few cents, an injury trifling and insignificant. The injury in no wise could be called irreparable within the sense of that term as employed in equity jurisprudence. Complainants Ratliff and Sullivan do not seek the protection of property rights. They would likely resent the imputation that they have any interest in liquors or any newspapers profiting by liquor advertisements, and even though a complainant might have an alleged interest in the sale of liquors or the operation of a newspaper within the confines of our state, a vote upon the liquor laws enacted by the legislature of

1916 might possibly help but could never hurt such complainant in the enjoyment of any such rights. It is conceded that the liquor laws in question are valid enactments of our legislature, and it must be remembered that complainants do not seek to prevent the enforcement of an illegal or unconstitutional act of the legislature. While the bills purport to enjoin the secretary of state in the performance of his ministerial duties, the gravamen of the bill after all is an injunction against the exercise by the people of a veto power upon the legislation in question. It cannot possibly hurt any one for the people to register their choice or will on these liquor laws. If the people approve the laws no injury has been inflicted upon any one, and the statutes in question remain valid and subsisting laws of our commonwealth. The liberty of property rights of no one will be affected.

With reference to the so-called game and fish law, Mr. Cade claims a right to enjoy the emoluments of his office as fish and game warden of Hinds county without the interruption of an election. What is said about the rights of Ratliff and Sullivan as taxpayers applies with equal force to the rights of Mr. Cade as a taxpayer. In addition, however, he claims the right to have the court protect him in his office. The game law in question is conceded to be a valid enactment of the legislature, and if the people by referendum vote approve the law, no injury is inflicted upon Mr. Cade or any one else. He will still continue to be the game warden of Hinds county. If the people reject or disapprove the law, then the rights of the people to nullify this act of the legislature can and will be called in question. If the initiative and referendum amendment is void and no part of our present Constitution, the vote of the people upon the game law will have no legal effect upon its validity, and Mr. Cade will still be the lawful game and fish warden of Hinds county, and as such entitled to the office and the emoluments thereof. This complainant, therefore, has not shown that irreparable injury will be done him

by submission of this question to a vote of the people. The injury threatened must be substantial and not fanciful or theoretical.

Counsel for appellees rely upon the case of *Conner v. Gray*, 88 Miss. 489, 41 So. 186, 9 Ann. Cas. 120, which was a suit instituted by certain citizens and taxpayers to restrain the holding of an election for the creation of a new county. There are some general expressions in this opinion sustaining the jurisdiction of chancery to enjoin an election called in violation of the Constitution and laws of the state, and these general expressions of the court support the argument of counsel for the complainants in the instant cases. We have examined the issues and the opinion of the court in this case of *Conner v. Gray*, and with the highest regard for the learning and ability of the judge delivering the opinion of the court in that case, we are forced to the conclusion that the statements of the court in that case upon the jurisdiction of equity are too general and far-reaching. It must be observed, however, that the court in the *Conner-Gray* Case declined the relief sought and dismissed the bill, and the decree of the lower court was affirmed. The court reached the right result in that case, and found, as a matter of fact, and so held that:

"The taxpayer has utterly failed to prove himself within the provision of the law as stated in *Gibbs v. Green*, 54 Miss. 592, in that he has failed to show, not only 'that the act about to be performed is unconstitutional,' but also failed to show that he will be injured in any way."

In addition to the alleged rights of the complainants as taxpayers a justice of the peace and certain members of the board of supervisors complained in that case of the attempt to create a new county upon the ground that they would be taken out of their county and jurisdiction and placed in a different county, and in response to the contention of these officers the court says:

"Neither the members of the board of supervisors, nor the justice of the peace, have any right to complain of the

exercise by the legislature of its constitutional power in the creation of a county until they become directly affected by it. They cannot maintain this bill simply because they fear some invasion may be made upon their rights as officers."

The pronouncements of the court in that case with reference to the interest of the complainants as taxpayers and officers fully accord with the views of the court here expressed as to the irreparable injury threatened complainants in the present cases, and the holding of the court there is really authority for the holding here made.

It will not do to say that the election if held will be void. The proper remedy will be appropriate action to prevent the execution of any proposition voted for. *Thompson v. Mahoney*, 136 Ill. App. 403. In this case the court observes that:

"The attempt to check the free expression of opinion, to forbid the peaceable assemblage of the people, to obstruct the freedom of elections, if successful, would result in the overthrow of all liberty regulated by law. The mere effort to assume such power is dangerous to the rights of the citizens. . . . The principle which would authorize the mighty mandate of a court of chancery in this case would justify it in every election to be held by the people, and thus the whole administration of the government might be obstructed and all power and authority placed at the footstool of the judge."

The practice contended for in the present cases would tend too much to government by injunction. It is time enough to elicit an expression of the court as to the validity of a law or constitutional amendment when the substantial rights of litigants have been invaded. It is well settled that courts cannot interfere with the legislature in the enactment of a void statute or with a municipal corporation in the mere enactment of a void ordinance. The legislature and the people of our state have undertaken to amend the Constitution in a way to confer the right upon the people to enact or reject a law by the so-

called initiative and referendum. This amendment the legislature has inserted as a part of the organic law of our state. Whether they have succeeded or not is a question not now before this court. It is sufficient to say that the qualified electors are now undertaking to act in pursuance of this authority, and in attempting to have the laws in question referred to their vote they are at least attempting the performance of a legislative act, and the courts have no more right to interfere with this legislative act of the people than they have to prevent an abortive attempt of the legislature to pass a law. The making of the laws belongs to a co-ordinate branch of the government, and the courts have nothing to do with the making, but must deal altogether with the finished product. The complainants in the present proceeding are seeking an advance opinion as to the validity of a constitutional amendment before that amendment has been enforced in a way to effect the substantial property rights of any one. There is no law authorizing a bill of complaint to remove an alleged cloud on or uncertainty about a statute or constitutional amendment before the same has been put into force and effect in a way to injure the parties complaining.

The recent case of *McAlester v. Milwee, supra*, sustains our view of the jurisdictional question. In that case the taxpayer attempted to enjoin the holding of an election to recall the mayor of the city. The court in that case says:

“Courts of equity are only conversant with matters of property and the maintenance of civil rights, and will not interfere to enforce or protect purely political rights. This doctrine has been universally applied in other jurisdictions where equity has been invoked to interfere in matters preceeding an election.”

In addition to the authorities relied upon by the Oklahoma court other authorities are listed in a note to this case as reported in 40 L. R. A. (N. S.) 576.

In the case of *State ex rel. Cranmer v. Thorston*, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582, an elector and taxpayer attempted to enjoin the submission to a vote of the people of a constitutional amendment upon the grounds that the submission would be invalid and without authority of law. It was contended in that case that the legislature had not legally passed the resolution submitting the amendment to the qualified electors of the state, and that the election if held would be a nullity. The court in a lucid and sensible opinion, among other things, says:

"If the legislature has proceeded properly and its proposed amendment shall be ratified by the people, the relator will have no legal cause of complaint, because, as a good citizen of the state, he will be bound to cheerfully accept the lawfully expressed will of a majority of its sovereign electors. If, on the other hand, the action of the legislature was such as to render any answer to the question inoperative, the Constitution will not be modified, and no one will be affected. Any additional burden which might result to relator, as a taxpayer, by reason of submitting this question at a general election, is too trifling, fanciful, and speculative for serious consideration; and if, as claimed by him, the legislature has done nothing but submit a question to the people, it has done what it had a right to do, and any additional expense resulting from such action will be a legitimate expenditure of public money. Evidently an essential ground of equitable jurisdiction is wanting."

A similar attempt to prevent the submission of a constitutional amendment to a vote of the people was made in the case of *People ex rel. O'Reilly v. Mills, Secretary of State*, 30 Colo. 262, 70 Pac. 322, wherein the court observes:

"The judicial department can no more interfere with such legislation or the successive steps necessary to be taken to amend the Constitution than it can with the general assembly in the passage of other laws, because the judicial cannot directly interfere with the functions of the

legislative department. . . . When laws have been passed no doubt in a proper case the inquiry can then be made as to whether or not the requirements of the fundamental law in their passage or in their provisions have been observed, but in the first instance the body to which has been delegated the power to pass laws must be left untrammelled, to act in such matters as its wisdom may dictate."

It is stated by Mr. Dodd in his work on the Revision and Amendment of State Constitutions, p. 232, that:

"In Oregon, for example, a measure may be initiated by the people or by the legislature and then submitted to the people for approval. . The submission of laws for popular approval in Oregon and in several other states makes such a popular vote an integral step in the process of ordinary legislature. But the courts at present decline to interfere with the process of legislation, and wait until the validity of a law is attacked before them."

Another case of interest in this question is that of *Duggan v. City of Emporia*, 84 Kan. 429, 114 Pac. 235, Ann. Cas. 1912A, 719, wherein complainants attempted to enjoin the calling and holding of an election under the initiative and referendum act of that state as applied to cities of the second class. The court declined to issue the temporary injunction, and in affirming the case the supreme court of that state, through PORTER, J., says:

"Another reason why the contentions of the appellant cannot be sustained, if it were conceded that he could maintain the action in his capacity as taxpayer, is that it does not appear that he will suffer any injuries as a consequence of the holding of the election. Acts which, though irregular and unauthorized, can have no injurious results constitute no grounds for equitable relief by injunction. 1 High. Inj. (4th Ed.), par. 9, and cases cited; *Hutchinson v. Delano*, 46 Kan. 345, 26 Pac. 740; *Coffeyville Min., etc., Co. v. Citizens' Natural Gas, etc., Co.*, 55 Kan. 173, 40 Pac. 326; *Hurd v. Atchison, etc., R. Co.*, 73 Kan. 83, 84 Pac. 553.

"If the result of the election is in favor of the proposed ordinances the statute (Laws 1909, ch. 82, par. 31; Gen. St. 1909, par. 1503) provides that they shall thereupon become binding and valid ordinances of the city; but when they are sought to be enforced, if any person's rights are affected thereby the courts are open for him to test the legality of the ordinances, as well as of the election by which they were adopted.

"One of the grounds urged for the injunction is that the ordinances are unconstitutional because of some defect in their title, but this gives a court of equity no jurisdiction to enjoin the passage of an ordinance. No one would claim that the legislature could be enjoined from the enactment of an unconstitutional law or that the electors could be enjoined from attempting in an unwarranted manner to amend the Constitution. It is a familiar principle that injunction will not lie to prevent legislative action by a municipal corporation. *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 17 S. Ct. 161, 41 L. Ed. 518; *Cape May, etc., R. Co. v. Cape May*, 35 N. J. Eq. 419; *State v. Superior Ct.*, 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819. . . .

"That this is an attempt to enjoin legislative action is apparent. The initiative and referendum statute provides that upon the presentation of a petition in proper form, duly certified by the city clerk, the mayor and council or mayor and commissioners shall do one of two things: Pass the proposed ordinance within ten days thereafter or call an election and submit the ordinance to the people; and upon its adoption by a majority of the electors it becomes a valid ordinance. This is legislation, either direct by the city or indirect by the people. . . .

"The futility of the proceedings to enjoin the submission of the proposed ordinances is likewise obvious when we reflect that the people may not adopt them, and the court ought not to be called upon to anticipate conditions which may never arise."

The same thought is reflected and approved in the statement appearing on page 1011, vol. 9 R. C. L.:

"It will rarely happen that a court can say in advance that irremediable wrong will result to individual electors from the result of an illegal election; and, moreover, there is ordinarily an adequate legal remedy afforded for testing the validity of the election after it has been held."

As stated by the Louisiana court in *Harrison et al. v. City of New Orleans et al.*, 33 La. Ann. 222, 39 Am. Rep. 272, in commenting upon an application to enjoin the mayor and administrators of the city of New Orleans and the common council from voting on or passing an alleged illegal ordinance:

"The mere voting on or passing the ordinance in question cannot *per se* do the plaintiff any possible injury. It will be time enough to complain, if it be a subject for complaint, when steps are taken, or a beginning made, to put the ordinance into actual execution."

A similar question came before the court of Illinois in *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220, a case which was begun by a bill in chancery praying that a certain act of the general assembly apportioning the state of Illinois into senatorial districts be declared unconstitutional and void, and to restrain the county clerk of one of the counties from issuing or causing to be posted notices of the election for representatives from the Eighteenth senatorial district. The court at the conclusion of a lengthy opinion says:

"Indeed, it is so well settled that courts will not enjoin the holding of an election that, in drafting the bills, the pleaders did not venture to pray for that species of relief. Furthermore, as is of course well known, the election to be held in November, 1894, will not be confined to the choice of senators and representatives in the general assembly, but it will be for the election of state treasurer, members of Congress, and certain county officers; and it is not pretended that, so far as those of-

ficers are concerned, the election will be in any respect illegal or unauthorized. Nor is it shown, at least by any clear or intelligible averment, that voting for senators and representatives in the general assembly in and for the districts created by the apportionment acts in question, will in any material degree increase the expense of holding the election. In no view, then, can it be held that the complainants, as taxpayers, have made out a case for an injunction to restrain the public authorities from doing acts whereby an illegal indebtedness will be incurred."

Counsel for appellees rely upon the case of *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916. The majority opinion in that case appears to sustain the jurisdiction of the court, but the dissenting opinion of COCKRELL, J. concurred in by Justice SHACKLEFORD, seems to express the safer view. It might be observed also that the suit in that case was by the governor of the state in his official capacity as well as a taxpayer, and the court may have been influenced by the thought that the governor should be accorded the right to prosecute this suit for and on behalf of all the people that might be affected by the constitutional amendment there attempted to be submitted to a vote of the people. This is reflected by the statement of WHITFIELD, C. J., in the majority opinion that:

"In view of the great importance of this matter to the people of the state, this court has permitted the merits of the cause to be fully argued at the bar for both parties on the application for a supersedeas."

Judge COCKRELL, in his dissenting opinion, well observes that:

"Should . . . the people adopt the amendment, the courts would then be open to any one upon a showing that he was injuriously affected thereby, and then, and not until then, in my opinion, should the courts interpose their views."

A safe rule was announced by Judge TERRAL in *Gibbs v. McIntosh*, 78 Miss. 648, 29 So. 465, that:

"It is not the policy of this state to have elections, and other political matters of government reserved to legislative discretion, interfered with by the judges and officers of the judicial department of the government."

The right of an elector to enjoin an election upon the ground that the act under which the election was attempted to be held was unconstitutional was denied in *Jones v. Black*, 48 Ala. 540.

We are fully conscious of the great importance and far-reaching effect of the serious questions so well argued at the bar in the present cases, and the commendable desire to facilitate an early adjudication upon the serious questions presented by these suits may have had much weight in inducing the learned chancellor to grant the temporary writ of injunction in this case. We prefer, however, to adhere to the safer policy that not only should equity refrain from interfering with the preliminary steps in the holding of an election on purely political matters, but should also refrain from interfering with the free exercise of the legislative functions of government whether attempted to be exercised by the legislature or by the people in their sovereign capacity. In declining to assume jurisdiction it necessarily follows that we intimate no opinion whatever upon the merits of the important questions attempted herein to be submitted for our decision.

Let the decree of the chancellor refusing to dissolve the temporary injunction be reversed, the injunction dissolved, and the cause remanded, with direction to dismiss the bills.

Reversed and remanded.

SYKES, J. (dissenting). I regret very much that I am unable to agree with the majority of the court in its opinion in this case; but I have such convictions to the contrary that I am forced to this dissent. In my opin-

ion, the court has jurisdiction of both these cases and should decide them upon their merits. I think this is especially so because of the great importance of the public question herein involved.

The complainants in both these cases had the right to maintain these suits. This question, in my opinion, is sustained by the better reasoned authorities; a very late case being that of *Crawford, Secretary of State, v. Gilchrist, Governor*, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916. Attention is also called to the other authorities, sustaining this proposition, cited in the briefs of counsel for appellees.

The chancery court had the power to grant the injunction, for the alleged constitutional amendment is void and unconstitutional; and this fact appears from a reading of the alleged amendment, or, as it is sometimes expressed, upon the face of the alleged amendment. The supreme court of Mississippi, in the case of *Conner v. Gray*, 88 Miss 489, 41 So. 186, 9 Ann. Cas. 120, which is the latest utterance of this court bearing directly upon this proposition, expressly sustains this power in the chancery court, under these circumstances. In my opinion, the authorities cited in this opinion (*Conner v. Gray, supra*), and also those cited in the briefs of counsel for appellees, amply sustain and support this rule.

The alleged constitutional amendment is void and unconstitutional, and this fact appears from an examination of the amendment itself. It is violative of section 273 of the Constitution, which provides that if more than one amendment be submitted at one time, then these amendments shall be submitted in such manner and form that the people may vote on each separately. The alleged amendment now under consideration, which was submitted as one amendment to be voted on by the people, contains two separate, different, and distinct amendments, relating to entirely different subjects. One of these amendments gives the people the right to initiate and regulate laws which may be passed, or have been passed, by the

legislature. In fact, the alleged amendment itself only purports to amend section 33 of the Constitution, which relates to the legislative power to enact laws. If this amendment had stopped there, it would not have been unconstitutional and void upon its face, but it goes further and also attempts, in the second place and in the same amendment, to give the people the right to initiate and enact a constitutional amendment. This second attempted amendment is not an amendment of section 33 of the Constitution, above referred to, but is an amendment of section 273 of the Constitution. In my opinion, there is a vast difference between a law which may be passed by the legislature—which we commonly term a “statutory law”—and a section of the Constitution, or a constitutional amendment. The makers of the Constitution of 1890 expressly provided entirely different schemes for passing statutory laws and constitutional amendments. This Constitution gave the legislature the power to pass statutory laws. At the same time, it vested only a very limited power in the legislature with reference to an amendment to the Constitution, viz., giving it the power to submit to the people a proposed constitutional amendment, after it had been voted on a certain number of times in each house of the legislature and had received upon each vote a certain proportion thereof. After thus passing the legislature, this proposed amendment had to be voted on by the people and receive a majority of all the votes cast in that election, and then it could not become a part of the organic law of the land until another legislature had passed upon these returns and inserted it by proper enactments into the Constitution.

This was a most wise provision of the makers of this great Constitution; the object and purpose being to protect the Constitution from the passing fads and fancies that oftentimes sweep over the country, and to preserve to the people, free from these fads and fancies, their organic law. It was by this Constitution expressly made exceedingly difficult to enact a constitutional amendment.

The alleged constitutional amendment under consideration makes it just as easy to enact a constitutional amendment as it does a statutory law.

The case of *State v. Jones*, 106 Miss. 522, 64 So. 241, and the authorities cited in the opinion of the court, sustain the view that these two amendments should have been separately submitted to the people.

In conclusion, I wish to briefly summarize my views of this case, and they are: First, that the chancery court had jurisdiction of these cases, and that this court should now decide them upon their merits; second, that the alleged constitutional amendment is void and unconstitutional, as appears from a reading of the alleged amendment, because it submits two separate amendments in one; and for these reasons I think the decree of the lower court, in both cases, enjoining the calling of the election, should be affirmed, and the injunctions made perpetual.

CUDAHY PACKING Co. v. STOVALL, STATE TREASURER.

[72 South. 870.]

1. TAXATION. *Refrigerator cars. Earnings. Constitutional provisions. Special mode of valuation and assessment. Equal protection of law. Uniform and equal. Burden upon interstate commerce.*

Laws 1912, chapter 113, sections 1-8, designating as freight line companies every corporation engaged in the business of operating, furnishing or leasing cars for the transportation of freight on railroad lines in whole or in part within the state not owned or operated by such corporations, and not otherwise listed for taxation, and requiring such corporation to make certain sworn statements to the state auditor, and providing that for purposes of taxation such cars shall have a *situs* within the state, and imposing a tax upon the property of such corporations of three per cent., upon their gross earnings, and providing for the col-

lection of such tax, and penalties for failure to furnish a statement or to pay the tax, considered with Laws 1912, chapter 114, taxing equipment companies, includes refrigerator cars, the property of a packing company, used solely for the transportation of its products over railroad lines within and without the state, though it owns or leases no railroad within the state or elsewhere.

2. TAXATION. Refrigerating cars. Earnings. Constitutional provisions. Special mode of valuation and assessment.

Such Statute does not contravene either section 112 of our state Constitution or any provision of the Federal Constitution, since by the express provisions of section 112 of our state Constitution the legislature may provide for a special mode of valuation and assessment, for corporate property or for particular species of property belonging to persons, corporations or associations not situated wholly in one county, and such statute is a means of imposing a legitimate tax on the rolling stock of a packing company situated and used in the state.

3. SAME.

Such tax as equal and uniform as contemplated by section 112, because all property of the same kind is classed for taxation in the same way.

4. SAME.

Such tax is not invalid as imposing a burden on interstate commerce. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from taxation and since resort to the receipts of property or capital employed in part at least, in interstate commerce, when such receipt or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, such tax is within the taxing power of the state.

APPEAL from the chancery court of Hinds county.
HON. O. B. TAYLOR, Chancellor.

Bill for injunction by the Cudahy Packing Company against P. S. Stovall, state treasurer. Demurrer sustained, temporary injunction dissolved, bill dismissed and complainant appeals.

The opinion of the chancellor, referred to in the opinion of the court, was as follows:

The complainant in this case is an Illinois corporation, having its domicile and principal office in the

city of Chicago. It is a packing house company, and in the conduct of its business of delivering its products to dealers and consumers uses refrigerator and other cars owned by it exclusively and used only for the purpose of transporting its own products. It does not own, nor has it leased, any railroad line in this state, but the various railroad companies haul its cars for hire into Mississippi and into many other states where the said company sells its products.

Chapter 113 of the laws of Mississippi of 1912 designates as freight line companies every person or corporation engaged in the business of operating cars, or of furnishing or leasing cars, not otherwise listed for taxation in Mississippi for the transportation of freight on railroad lines in whole or in part within the state, the said railroad lines not being owned, leased, or operated by such person or corporation. The chapter provides for certain sworn statements to be made to the state auditor by such freight line companies, and declares that for the purpose of taxation all cars of such companies used exclusively or partly within and partly without this state have a *situs* within this state. The chapter further provides in section 5 for a tax upon the property of such companies, in lieu of all other taxes, of 3 per centum upon the gross earnings of such companies; the term "gross earnings" to be construed to mean all earnings on business beginning and ending with this state, and a proportion, based upon the proportion of mileage over which such business is done, of earnings on all interstate business passing through, or into, or out of the state. The remaining sections of the act provide for the collection of the tax, and for penalties for failure to furnish statements, or for failure to pay the tax.

Complainant filed its bill in the chancery court and secured an injunction to prevent the collection of the tax, seeking to avoid it on the ground that it is not a freight line company within the meaning of the act,

and further upon the ground that the act is in violation of certain provisions of both the state and the United States Constitutions. We are of the opinion that under this act the complainant is classed as a freight line company, and it only remains to consider whether or not the act violates any of the provisions of the Constitutions.

In the outset it should be noticed that the tax imposed is in lieu of all other taxes upon the said property of complainant. We do not think it is a privilege tax, but that the legislature, following the provisions of section 112 of the state Constitution, which recognizes the fact that it is necessary for a special mode of valuation to be provided for assessing corporate property not wholly within one county, has provided for a plan to arrive at the true valuation of the property to be taxed. In other words, the legislature simply means to say that the value of complainant's property for taxation does not only consist of the actual value of the cars used by it, but that the real value is reached by adding to this that increased value and worth which arises by reason of the fact that these cars are used in connection with and as a part of a great business, operating over many lines of railroad, through many states, and possessing valuable franchises, rights, and privileges, and forming one indivisible unit. In fact, doubtless, the principal value of its property consists in all this combination of units, all interwoven and interrelated to each other, and making, as stated, one great business. The right of the states to reach and tax this true value is conceded over and over again in decisions of the supreme court of the United States. We mention this to show that the contention that the tax is not uniform and equal with other taxes, that it is out of proportion to the value of the property, and that it denies complainant equal protection of the laws, is without merit. Aside from this, however, we think that under this act all property

of the same kind and class is classed for taxation in the same way, and, as we understand it, is therefore equal and uniform in a constitutional sense.

To our mind, the real difficult problem in this case is the solution of the question as to whether or not this act does not violate the clause of the Federal Constitution in reference to interstate commerce. There are a great number of decisions of the supreme court of the United States construing this section from cases arising under taxation statutes of the various states, the statutes being somewhat similar to the act here in question. Some of these decisions sustain, others condemn, the statutes, and it is very difficult, indeed, to arrive at the true line between that class of statutes which have been upheld and those which have been condemned. As we have stated, the supreme court holds that not only is the physical property, such as cars, track, wire, etc., of corporations engaged in interstate commerce taxable within the state where situated, but that in addition to this the state has the power to tax all the property of such corporations used in interstate business, in proportion to the mileage within the state as compared with the mileage without the state, and that to this may also be added the proper proportion of the increased value of such property which arises and is created by reason of its separated articles of property being combined and used as one unit, and making an extensive business, possessing valuable franchises, privileges, and rights, and extending into many states and over many lines of railroad.

It has also consistently held that although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation of the business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations engaged in such commerce can be, and, whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as

falling within the inhibition of the Constitution. The fact that the proper taxation of its property may have the effect of incidentally affecting interstate commerce makes no difference at all. It enjoys the protection of the laws of the state government, and is under obligation to contribute to its support. It matters not by what name a tax may be called, yet if it amounts to only a tax upon its property, then such a tax is valid. In this case we do not believe that the tax is imposed upon the gross earnings, but that these gross earnings are used simply and alone, as we have stated, for the purpose of arriving at the value of the property taxed. The statute plainly says that it is upon the property of complainant, and goes further in saying that it shall be in lieu of all other taxes.

We believe that a careful reading of the following cases will disclose the fact that under the law the property of complainant is properly taxable under the act and that the same is constitutional: Case note, 57^a L. R. A. 59; *Maine v. Trunk Ry. Co of Canada*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994; *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, and rehearing on same case, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953; *Cleveland etc., R. R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *American Refrigerating Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; *Union Ref. T. Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708. As to due process of law and equal protection of laws under the Fourteenth Amendment: *Merchants' & Manufacturers' Bank v. Pa.*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236.

For the foregoing reasons we are of the opinion that the demurrer is well taken and should be sustained.

Boothe & Pepper, for appellant.

Geo. H. Ethridge, Assistant Attorney-General for appellee.

STEVENS, J., delivered the opinion of the court.

STATEMENT OF THE CASE.

Appellant is a nonresident corporation, chartered under the laws of the state of Illinois, extensively engaged in the slaughterhouse and packing business. This company, as complainant in the court below, filed its bill of complaint in the chancery court of Hinds county, seeking to restrain appellee as the treasurer of the state from collecting a certain tax and the penalty thereon imposed by chapter 113, Laws of 1912, entitled "An act providing for the taxation of freight line companies." Section 1 of this act reads as follows:

"Be it enacted by the legislature of state of Mississippi, that every person or persons, joint stock association or corporation, wherever organized or incorporated engaged in the business of operating cars, or engaged in the business of furnishing or leasing cars not otherwise listed for taxation in Mississippi, for the transportation of freight (whether such cars be owned by such company or any other person or company) over any railroad line or lines, in whole or in part, within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by some other name, shall be deemed a freight line company."

Section 2 of the act makes provision for sworn statements to be rendered to the auditor, giving the

name and location of the company, the nature of its business, the total number of cars used, and the whole length of the line of railway over which the company runs its cars, as also the length of so much of its line as is without and is within the state of Mississippi, and other information therein called for. Section 3 declares that for the purpose of taxation "all cars used exclusively within this state, or used partially within and without the state, are hereby declared to have a *situs* in the state," etc. The act also provides that every freight line company shall render a statement showing the total gross earnings received from all sources by the company within the state for the year ending December 31st; and section 5 defines the term "total gross earnings" as meaning "all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of mileage over which such business is done, of earnings on all interstate business done, of earnings on all interstate business passing through or into or out of the state;" and subsequent provisions require each freight line company to pay a tax "on its property and in lieu of all other taxes upon the same" equal to three per centum upon the gross earnings of the company as defined in the act. Taxes collected under this statute are to be paid into the state treasury and credited to the general revenue fund. Section 7 provides for a certain penalty to be imposed for failing to furnish the required statements, while section 8 imposes a penalty for failing to pay the tax.

It appears that a small tax of thirty dollars and seventy cents was assessed against appellant as a freight line company under the act in question, and, upon refusal of appellant to pay, the treasurer was threatening to distrain sufficient goods and chattels belonging to complainant out of which to realize the tax and ten per cent. penalty thereon for each month after demand made. The company thereupon exhibited its bill for an injunction and obtained a temporary writ of

injunction. Appellee appeared and demurred to the bill of complaint. The demurrer was sustained, the injunction dissolved, and the bill dismissed. From the decree dismissing the bill appellant prosecutes this appeal, contending, first, that appellant is not a freight line company within the purview and meaning of this act; and, secondly, that if appellant comes within the provisions of the act it should have prevailed in this suit, because the act violates section 112 of our state Constitution, as also, clause 3 of section 8 of article 1, and section 1, article 14, of the Constitution of the United States.

OPINION.

Appellant by its bill admits that it is doing a large packing house business over the United States, including Mississippi, and that in the handling and shipping of its products it has found it economical and expedient to have constructed and to use its own refrigerator cars, suitable for the purpose of properly handling meats and other packing house products, and that these cars are the property of the complainant, used solely and only for the transportation of the complainant's products. The bill further shows upon its face that these cars containing the property and products of appellant are drawn and carried over railroad lines in Mississippi. It is contended, however, that appellant owns no railroad in Mississippi or elsewhere; that it is not the lessee of a railroad; that its cars are its own property, and "are not used for profit or hire," and therefore that appellant is not operating a freight car line within the meaning of the act under review.

We are of the opinion that complainant comes within the terms of the act. This statute appears to have been copied and indeed is almost an exact rescript of an act passed by the legislature of the state of Minnesota as chapter 250, Laws of 1907 of that state. The main dif-

ference between the Minnesota statute and our statute is that under the Minnesota law a tax equal to four per cent. of the gross earnings is imposed, whereas our statute imposes a tax equal to only three per cent. This very packing house company refused to pay the Minnesota tax, and a suit by the state brought that statute up for examination and review by the supreme court of Minnesota, as disclosed by the case of *State v. Cudahy Packing Co.*, 129 Minn. 30, 151 N. W. 410. Section 1 of our statute is in the exact words of section 1 of the Minnesota statute, and the opinion of the Minnesota court, among other things, says:

"We think defendant comes clearly within this law. The intention to bring the large shippers who furnish the cars for the transportation of their products is indicated, not only by the clause in parenthesis, but by the careful description of the kind of cars usually owned and operated by these shippers. . . . The defendant is not an equipment company, as described in the stipulation, nor as defined in the original statute. It was never engaged in the business of furnishing or leasing cars to be used in the operation of railroads, but it furnished cars for the conduct of its own transportation business. . . . It is evident that operating here does not refer to the physical power exerted in moving the cars upon the railroad tracks, but to the fact that the freight line company directs and controls the movement of the cars employed in the conduct of its transportation business as to kind and quantity of freight to be carried, the route, and the destination."

The same contentions made by this company in the Minnesota case are now made before us. Appellant comes within the plain terms of the statute. It cannot free itself from the burden of this tax by simply averring in the bill that its cars are not operated "for profit or hire." The manifest purpose of the statute is to impose a tax upon such property of the company as is used or operated in Mississippi. It is a matter of common

knowledge that these large packinghouse companies ship their products in carload lots and in their own cars, and these cars are virtually moving commissaries. Such cars are not taxable as a part of the rolling stock or equipment of railroads, for the simple reason that they do not belong to the several railway companies who contribute to the revenues of our state. It is certain that the use of these cars does not represent a donation to the railroads, and also that the use of the cars is a thing of value. The bill does not follow up its allegation that the cars are not used "for profit or hire" by further allegations that the railroad companies do not allow appellant a lower freight rate in the nature of a rebate or a sum of money equivalent to a rental value on each car. By the express terms of the statute appellant is engaged in "operating cars" over a railroad line or lines in Mississippi that belong to other companies. If appellant owned the railroad line, it of course would not come within the terms of the act. The very purpose of the act is to impose a tax on cars not belonging to the railway companies.

It is further to be noted that chapter 114, Laws of 1912, entitled "An act providing for the taxation of equipment companies," was passed by the legislature at the same time and was approved on the same day that chapter 113 was approved. The essential business of an equipment company is to hold title to cars, engines, and rolling stock, and furnish same for the use of railroad companies for a stipulated profit, rental, or hire, and to serve as a device to prevent the equipment from becoming subject to the lien of trust deeds or mortgages executed by railroad companies. The defense interposed by appellant would be more appropriately pleaded against chapter 114, taxing equipment companies. It is our judgment, therefore, that complainant made sufficient admissions in its bill of complaint to bring it within the terms of the statute.

Without discussing in detail the objections to the constitutionality of the law, we hold that the statute does not contravene either section 112 of our state Constitution or any provisions of the Federal Constitution. By the express provisions of section 112 of our state Constitution the legislature may provide for a special mode of valuation and assessment for "corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county." The Legislature in its wisdom has adopted this method of arriving at the valuation of that portion of appellant's property used in Mississippi, and the tax imposed is in lieu of all other *ad valorem* taxes. It is a means of imposing a legitimate tax upon the rolling stock of appellant situated in and used in Mississippi. The tax is equal and uniform, as contemplated by section 112, because all property of the same kind is classed for taxation in the same way.

There is no manifest effort here by the legislature to burden interstate commerce. "The mere fact that a corporation is engaged in interstate commerce does not exempt its property from . . . taxation." *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127. "A resort to the receipts of property or capital employed, in part at least, in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, has been sustained." *Id.* On both of these propositions abundant authorities are collated in the opinion of the United States supreme court just referred to.

It must readily be conceded that our state has no right to impose a tax that directly burdens interstate commerce. The present company, however, is not chartered primarily to transport commerce, although it is doing an interstate business. It is engaged in the general business of slaughtering animals and of packing

Opinion of the court.

[112 Miss.]

and selling their products. In doing this business in Mississippi it owns and uses its own cars, and these cars so situated or used in Mississippi are proper subjects of taxation. "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. Ed. 311; *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459.

In the present case a very small tax has been assessed against appellant. Just how the amount of this tax was arrived at the bill does not show. We are justified in assuming that appellant complied with the statute in furnishing the statements called for by the law in question, and that upon the information furnished the amount of the tax was assessed in accordance with the terms of the statute. Be that as it may, the bill does not advise the court how many cars appellant uses or operates in Mississippi, and does not charge that the state officers in levying the tax pursued any method except that provided by the statute. The gravamen of the bill is an assault upon the constitutionality of the statute, and, the objections on constitutional grounds being without merit, we think the bill fails to state a cause of action. The learned chancellor in disposing of the case prepared and delivered a written opinion, the reasoning of which, as well as the decree based thereon, meets with our approval.

Affirmed.

ILLINOIS CENTRAL RAILWAY COMPANY v. W. J. DAVIS & COMPANY.

[72 South. 374.]

1. CARRIERS. *Live stock. Time for claiming damages. Consideration. Courts. Rule of decision. Federal court decisions. Waiver.*

Where two different rates were offered by a railroad to a shipper and the shipper accepted the lower rate, this was a sufficient consideration for a clause in the contract of shipment requiring the shipper to make claim within ten days from the date of delivery for any damages.

2. CARRIERS. *Live stock. Claim of loss. Time. Reasonableness.*

A provision in a contract of shipment of live stock, requiring the shipper to make claim for damages for loss within ten days from the delivery of the car of stock, when supported by a consideration is valid and reasonable.

3. RULES OF DECISION. *Federal court decisions.*

In the case of interstate shipments, the rule announced by the federal courts as to the reasonableness of a limitation by contract for the shipment of live stock, of the time within which a claim for loss must be made, will be followed by the state courts.

4. CARRIERS. *Live stock. Claim of loss. Waiver.*

Where a shipper of live stock, under a contract requiring that notice of loss should be filed within ten days after delivery did not file a written notice of his claim with any proper agent of the carrier as required by the contract, but orally mentioned the damages or loss to a traveling freight agent of the railroad, who had no authority to receive such notice nor deal with such matters. In such case there was no waiver by the carrier of the requirements of the contract and the shipper was precluded from recovery.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by W. J. Davis & Co. against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals.

Appellees brought suit against appellants for damages based on alleged injuries inflicted upon a carload

of cattle shipped from Jackson, Miss., to East St. Louis, Ill. When the shipment arrived at Mounds, Ill., it had been on the road about thirty-two hours, and it would take at least nine hours longer to reach East St. Louis, and in order to comply with the interstate regulation, prohibiting confinement of cattle longer than thirty-six hours on a train without unloading for feed, rest, and water, the shipment was unloaded and kept at Mounds from two-twenty p. m. April 1st, to six-ten p. m. April 2d, or about twenty-eight hours, during which time they were watered and fed and allowed to rest. It is shown that another train left Mounds about four-thirty p. m. and one about six-ten p. m. on April 1st, and another at six-fifteen a. m. April 2d, and plaintiff claims that the cattle should have been shipped on one of those trains rather than allowed to remain at Mounds until six-ten p. m. April 2d. Plaintiff alleges that because of such delay the shipment did not arrive in East St. Louis until April 3d, and that the market had declined during that time, and that there was considerable shrinkage in the weight of the cattle, and for this loss plaintiff sues. Plaintiff alleges that there were a number of unnecessary delays at other points along the road before reaching Mounds, and that the shipment should have reached East St. Louis in time for the market on April 1st, or at latest in time for the market on April 2d. The defendant pleaded the general issue, and interposed a special plea, giving notice of the provisions of the contract of shipment, which recited:

“It is further agreed by the shipper that no claim for loss or damage to stock shall be valid against said railroad company unless it shall be made in writing, verified by affidavit and delivered to the general freight agent, or freight claim agent, of the railroad company, or to the agent of the company at the station from which the stock is shipped, or to the agent of the company at the point of destination, within ten days from the time said stock is removed from said cars.”

The contract of shipment also provided that the maximum amount he could claim as damages for injury to any of the cattle shipped in the car was fifty dollars per head, and provided, further, that if a higher value was to be declared on the shipment, an additional rate would be charged, and defendant then offered in evidence an extract from the southern classification under which this shipment moved, and which provided as follows:

“General Rules.

“Rule 1.

“The reduced rates specified in this classification will apply only on property shipped subject to the conditions of the carrier’s bill of lading. Property carried not subject to the conditions of the carrier’s bill of lading will be at the carrier’s liability, limited only as provided by common law and by the laws of the United States and of the several states, in so far as they apply. Property thus carried will be charged ten (10) per cent. higher (subject to a minimum increase of one (1) cent per hundred pounds) than if shipped subject to the conditions of the carrier’s bill of lading.”

• The appellee took advantage of the reduced rate, although his cattle were worth about seventy dollars a head, the rate charged was thirty-six cents per hundred-weight according to the contract, whereas if he had paid a ten per cent. higher rate, the carrier’s liability would have been—

“limited only as provided by common law and by the laws of the United States and of the several states so far as they apply.”

It is shown on the trial that no written notice was given by appellee to any of the agents mentioned in the contract of shipment above quoted, but that one of the members of plaintiff’s firm mentioned the matter to the traveling freight agent of the defendant company, and asked for an allowance because of this loss, and that this agent said he would take it up, and it is claimed by the appellee that the appellant in this way waived the

ten days' limitation provided in the contract for giving written notice of claim for loss.

Mayes, Wells, May & Sanders, for appellant.

Howie & Howie, for appellee.

HOLDEN, J., delivered the opinion of the court.

This case was appealed from the circuit court of Hinds county, where the appellee, W. J. Davis & Co., recovered a judgment against appellant for damages to stock in transit. On May 8, 1916, we affirmed the judgment of the lower court, but after a careful consideration of the suggestion of error filed here by the appellant, we are forced to the conclusion that our decision in affirming the judgment of the lower court was error.

The three questions presented in this case are: First, whether or not there was a consideration upon which to base the stipulation in the contract, requiring that the shipper shall make claim for any damage or loss within ten days from the date of delivery of the car of stock; second, whether or not this stipulation, requiring such notice within that time, is a reasonable stipulation; and, third, whether or not, in this case, the appellant railroad company received and accepted verbal notice of the claim within the prescribed time, and thereby waived the stipulation in the contract.

The facts in the instant case do not bring it within the rule announced in *Yazoo, etc., R. Co. v. Bell*, 71 So. 272. The record here shows two different rates were offered by the railroad to the shipper, and the shipper accepted the lower rate, which, as held in the *Harriman Case*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690, is a sufficient consideration for the validity of the clauses in the contract of shipment.

In the case of *G., F. & A. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, it is held that a provision in a bill of lading, requiring a claim to

be filed within the stipulated time, is valid. In the *Harriman Case*, *supra*, similar provisions and stipulations in such contracts are held to be reasonable and valid if supported by a consideration. *Railway v. Wall*, 241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905. The shipment of stock in the case before us was an interstate shipment and, of course, the rule announced by the Federal courts in such cases will be followed by the state courts. We think the stipulation in the contract in the case now before us is reasonable and valid. *Chicago, etc., R. Co. v. Craig* (Okl.), 157 Pac. 87; *St. Louis, etc., Ry. Co. v. Marcofich* (Tex. Civ. App.), 185 S. W. 51; *Howard v. C., R. I. & P. Ry. Co.* (Mo. App.), 184 S. W. 906; *Baldwin v. Railway Co.* (Iowa), 156 N. W. 17, L. R. A. 1916D, 335; *St. Louis, etc., Ry. Co. v. Wynn* (Okl.), 153 Pac. 1156; *Crawford v. Southern Ry. Co.*, 101 S. C. 522, 86 S. E. 19; *W. H. Mitchell & Co. v. Ry. Co.*, 15 Ga. App. 797, 84 S. E. 227; *Cox v. Railway Co.*, 188 Mo. App. 515, 174 S. W. 127; *St. Louis, etc., Ry. Co. v. Burnett*, 117 Ark. 656, 174 S. W. 1165; *Dunlap v. Railway Co.* 187 Mo. App. 201, 172 S. W. 1178; *Bowman v. Railway Co.*, 185 Mo. App. 25, 171 S. W. 642; *Duvall v. Railway Co.*, 167 N. C. 24, 83 S. E. 21; *M. & N. A. R. R. Co. v. Ward*, 111 Ark. 102, 162 S. W. 164; *Kidwell v. O. S. L. R. R. Co.*, 208 Fed. 1, 125 C. C. A. 313.

There was no waiver here by the appellant railroad company, according to this record, of the stipulation of the ten-day notice in the contract. The appellee did not file his claim in writing with any of the proper agents of the railroad, as named and required by the terms of the contract, but he claims to have orally mentioned the damage or loss to a traveling freight agent of the appellant, who had no authority to receive such notice nor deal with such matters. *Clegg v. Railroad*, 203 Fed. 971, 122 C. C. A. 273.

The appellee, according to the proof in this record, having failed to file his claim for loss and damage within

the time provided by the contract, is nor precluded from recovery. This court's judgment of affirmance is set aside and the judgment of the lower court is reversed, and judgment entered here for appellant.

Reversed.

ROSENSTOCK v. BOARD OF SUPERVISORS OF WASHINGTON
COUNTY ET AL.

[72 South. 876.]

1. COUNTIES. *Bonds. Election. Notice. Publication. Statutes. Title. Sufficiency of title. Appeal and error. Review. Questions to be decided.*

Chapter 174, Laws 1916, which is an amendment to chapter 176, Laws 1914, does not require any publication of the intention of the board of supervisors to issue road bonds, where the petition presented shows that the proposed bond issue is in excess of five hundred thousand dollars; when the bond issue is to be in excess of five hundred thousand dollars the board of supervisors is by the statute required to order an election to ascertain the will of the qualified electors of the county.

2. COUNTIES. *County bonds. Notice. Publication.*

Where the notice of an election for a road bond issue, was the publication in newspapers of the county, for four weeks of the order of the board of supervisors calling the election and also the publication for the same length of time of the notice of the election given by the election commissioners of the county, the law was fully complied with. The statute does not prescribe any specific form of notice and such publication of notice fully advised the electors of the proposed elections.

3. STATUTE. *Title. Sufficiency.*

Where a statute has a title, its sufficiency was a legislative and not a judicial question.

4. APPEAL AND ERROR. *Review. Questions to be decided.*

The supreme court is not called on to decide the legal aspect of a purely imaginary contingency.

5. COUNTIES. *Bonds. Statutes. Sufficiency.*

Since Laws 1914, chapter 176, section 11, requires the consent of the taxpayers themselves to the issuance of bonds for road taxes, the act is not subject to attack on the theory that bonds might be issued to such an amount that they would become confiscatory, for taxpayers if same would not consent to such confiscation, and the courts are not bound to protect them from their folly.

6. COUNTIES. *Bonds. Limitations.*

Section 331, Code 1906, relating to issuance of bonds by the board of supervisors, prohibits the issuance of bonds to an amount which added to all of the bonded indebtedness of a county shall exceed five per cent. of the assessed value of the taxable property appearing on the assessment roll. Laws 1914, chapter 176, as amended by Laws 1916, chapter 174, authorizes the issuance of highway bonds on a vote of the qualified electors without limitation. These two acts are not irreconcilable, since the first imposes limitation on the powers of the board of supervisors, while the latter merely authorizes the taxpayers to tax themselves.

APPEAL from the chancery court of Washington county.

HON. E. N. THOMAS, Chancellor.

Bill by Morris Rosenstock against the board of supervisors and the highway commission of Washington county. From a judgment sustaining a demurrer to the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

D. S. Strauss, for appellant.

Percy & Percy and *Wm. Ray Toombs*, for appellees.

COOK, P. J., delivered the opinion of the court.

This case involves the validity of a proposed issue of nine hundred and fifty thousand dollars of Washington county bonds, for the purpose of building permanent roads, and in turn involves a construction of chapter 176, Laws 1914, and chapter 174, Laws 1916, being the statutes under which Washington county proposes to issue and sell said bonds.

The facts are these: Almost immediately after the passage of the act of 1916, to wit, on the 24th of April, 1916, the board of supervisors of Washington county were petitioned to submit to the voters of the county the question of a bond issue for the building of permanent roads, under the provisions of chapter 174, Laws 1916, and chapter 176, Laws 1914; the petition reciting that the amount of the proposed bond issue was in excess of five hundred thousand dollars, and that the boundaries of the proposed district included all of the territory embraced within the county. The total number of qualified electors in the county were one thousand three hundred and thirteen, and more than twenty per cent., to wit, three hundred and ninety-six, signed the petition. Thereupon the board ordered the election, the order complying with the statute, and fully setting forth the purposes for which the election was to be held. A copy of the order was published in the newspapers published in the county for four successive weeks, and the commissioners of election gave four weeks' notice of the election by publication in the Greenville Democrat, a newspaper published in the city of Greenville, and having a general circulation in the county. At the election, out of one thousand three hundred and thirteen qualified electors, eight hundred and twenty-five voted in favor of the bonds, and one hundred and ninety voted against such issuance. Thereafter, at a regular meeting of the board of supervisors, on the 6th day of July, 1916, the board ordered the issuance of nine hundred and fifty thousand dollars of bonds. The total assessed valuation of the taxable property in the county is nine million, six hundred thirty-two thousand, six hundred and twenty-one dollars. The highway commission passed an order fixing the amount of the bonds to be issued, the form, maturity, rate of interest, etc., and the board of supervisors, it is alleged, at its November meeting will adopt the recommendations of the highway commission, and will direct the issuance of said bonds

in accordance therewith. These facts are set forth in the bill, and admitted by the demurrer.

The objections made by appellee to the bond issue are:

(1) There was no notice given by publication in accordance with the terms of chapter 176, Laws 1914. There is no merit in this objection, because chapter 174, Laws 1916, which is an amendment to chapter 176; Laws 1914, does not require any publication of the intention of the board of supervisors to issue bonds, when the petition presented shows that the proposed bond issue is in excess of five hundred thousand dollars. When the bond issue is to be in excess of five hundred thousand dollars, the board of supervisors is by the statute required to order an election to ascertain the will of the qualified electors of the county.

(2) It is objected that proper notice of the election was not given. The notice given in this case was the publication in newspapers of the county, for four weeks, of the order of the board of supervisors calling the election, and also the publication for the same length of time of the notice of the election given by the election commissioners of the county. The law was fully complied with, and it follows that the objection is not well taken; the facts of record do not sustain appellee's contention.

It will be noted that a majority of the qualified electors of the county did actually vote in this election for the issuance of the bonds. The statute does not prescribe any specific form of notice, and in this case the notice published fully advised the electors of the proposed election, and a majority of the electors did vote for the bond issue. *Kemp v. Hazlehurst*, 80 Miss. 443, 31 So. 908.

The third objection challenges the sufficiency of the title of the act of the legislature under which it is proposed to issue bonds. This objection is of no merit, as the act in question has a title; its sufficiency was a

legislative, not a judicial, question. *State v. Phillips*, 67 So. 651, L. R. A. 1915D, 530.

The road district created in this case is composed of and takes in all the county of Washington, and the objection insists that it is within the power of the inhabitants of the county to create subroad districts *ad infinitum*, and until the burden of taxation will be confiscatory—and when this happens—nothing would be left to tax to secure money with which to liquidate the bonds in question. If it can be imagined that the taxpayers would possibly consent to the confiscation of their property, it seems a sufficient answer to this suggestion to say that we are not called on to decide the legal aspect of a purely imaginary contingency. We would be bound to assume that the owners of Washington county might hereafter become insane, and more than that, we would be bound to assume that bond buyers would also become insane, before we could admit that such a condition was possible.

However, we will try to think that the contingency is possible, and what then? We answer that section 11, chapter 176, Laws 1914, would meet the situation. and would save the taxpayers from themselves. Their property could not be subjected to the burdens which appellee apprehends, unless they consented, and as lunatics cannot consent, the taxpayers of Washington county would be entirely safe. Besides all this, we can see no legal reasons why the courts should intervene to protect the taxpayers from the consequences of their own folly. If the taxpayers elect to burden themselves with confiscatory taxation it is not within our power to save them. The taxpayers, generally speaking, have the constitutional right to give away their property. The question here presented may appeal to the legislative department.

The next objection is, that the county of Washington has already issued bonds under the authority of section 331, Code 1906, and the amount of the bonds so issued,

added to bonds to be issued in this case, will exceed the "five per centum of the assessed value of the taxable property of the county."

Section 331 provides for an entirely different class and character of bonds than the bonds proposed to be issued in the present case. Moreover, it is quite clear that section 331 had no reference to the sort of roads provided for in the case before us.

We have made progress since the passage of section 331, and Washington county is now embarked upon a system of road improvement undreamed of in 1906; but be that as it may, the act under review depends upon the consent of the people who are to pay the price, and it is quite evident to us the legislature did not intend that the scheme here discussed should be limited in its scope by section 331.

There is no inconsistency in the two statutes; both may stand. The board of supervisors must go to the people for authority to exceed the limit fixed by section 331 of the Code, and that has been done in the manner prescribed by the statute.

The demurrer to the bill of complaint was properly sustained, and the judgment of the lower court is affirmed.

Affirmed.

ELLIS v. DONNELL, Sheriff.

[72 South. 878.]

COUNTIES. *Highways. Improvement. Powers of supervisors. Statutes.*

Chapter 177, Laws 1916, provides an additional method to the present method of working public roads of any county or beat, it furnishes an entirely separate and distinct method from that provided by Code 1906, section 333, and the only limitation on the right of the board to issue such road bonds, is that

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Statement of the case.

[112 Miss.]

the bond issue shall not exceed five per centum of the assessed valuation of the real and personal property of such district, exclusive of outstanding bonds.

APPEAL from the chancery court of Rankin county.

HON. GEO. C. TANN, Chancellor.

Injunction by W. C. Ellis against S. D. Donnell, Sheriff and tax collector. From an order sustaining a demurrer to the bill, complainant appeals.

Appellant filed a bill in chancery seeking to enjoin the appellee from acting in his official capacity in the collection of a special tax levied by the board of supervisors to pay interest on and create a sinking fund for the retirement of fifty thousand dollars of road bonds of supervisor's district No. 1, Rankin county, Miss., issued under chapter 177, Laws 1916, which provides that the board of supervisors may raise funds for the working and construction of public roads and building bridges by a commutation tax or an *ad valorem* tax or an acreage tax, or by a bond issue not to exceed five per centum of the assessed valuation of all property of such district, or both or any of such methods, and provides, further, that said act shall not repeal any other act or alter any other method of working public roads. There is no provision in said act for the holding of an election, and it is contended by appellant that section 333 of the Code of 1906, providing for publication of notice and the calling of an election on petition of ten per centum of the adult taxpayers protesting against the issuance of such bonds, is controlling.

The lower court sustained a demurrer to the bill, and this appeal is prosecuted.

J. Knox Huff, for appellant.

Sidney L. McLaurin and *Stingily & McIntyre*, for appellee.

STEVENS, J., delivered the opinion of the court.

The only question presented by this appeal that requires an expression from us is whether the board of supervisors, under chapter 177, Laws 1916, can issue road bonds for supervisor's district No. 1, here in question, without calling the election provided by section 333, Code 1906, initiated by ten per centum of the adult taxpayers; or, in other words, whether chapter 177, Laws 1916, furnishes an entirely separate and additional authority for the issuing of road bonds for a supervisor's district which has been duly organized into a separate road district under the terms and provisions of the amendatory act of 1916. This chapter 177, Laws 1916, amends chapter 257, Laws 1912, which in turn amends chapter 150, Laws 1910, entitled "An act to provide additional methods of working public roads," etc. We hold that chapter 177, Laws 1916, means exactly what it says; that is, that it is "in addition to the present method of working public roads of any county or beat," and that it "shall not repeal any other act or any other method of working public roads." It furnishes an entirely separate and distinct method from that provided by the Code sections in question; and the only limitation on the right of the board to issue the bonds in question is that the bond issue shall "not exceed five per centum of the assessed valuation of the real and personal property of such district, exclusive of outstanding bonds."

The demurrer to the bill was properly sustained.

Affirmed.

WOODS v. CITY OF TUPELO.

[72 South. 879.]

CRIMINAL LAW. Presence of accused. Reception of verdict.

Where in a prosecution for the unlawful sale of intoxicating liquors, after the jury had retired and before their return the court adjourned until the following day, until which time all parties and witnesses were discharged and after adjournment and after accused had left the court room, the jury notified the court that they were ready to report and the court without notice to accused or his counsel received the verdict, finding defendant "guilty as charged." In such case the court's action was reversible error, since it denied accused his constitutional right to be present at every stage of the trial.

APPEAL from the circuit court of Lee county.

HON. CLAUDE CLAYTON, Judge.

Sarah Woods was convicted of unlawful retailing of intoxicating liquor and appeals.

The facts are fully stated in the opinion of the court.

Geo. T. Mitchell, for appellant.

C. P. Long, for appellee.

COOK, P. J., delivered the opinion of the court.

Appellant was tried in the circuit court of Lee county upon a charge that she had unlawfully sold beer within the corporate limits of the city of Tupelo. After the evidence was introduced, the instructions of the court were read to the jury, and counsel for the prosecution and for the defendant completed their arguments, and the jury retired to consider their verdict. Before the jury had reported their verdict, the court, at four o'clock p. m., announced from the bench that the court would be adjourned until eight thirty o'clock the following morning. The sheriff then announced in

open court that all parties and witnesses were discharged until eight thirty o'clock the following morning. After the adjournment of the court, and after appellant and her attorneys had left the courtroom, the jury notified the court that they were ready to report, whereupon the court, without giving any notice to the defendant or her counsel, received the verdict of the jury finding the defendant guilty as charged. On the following morning, when the court convened, a bill of exception was presented to the presiding judge, embodying the above facts, which was signed by the judge. Defendant also made a motion to arrest the judgment, based on the facts above stated, which motion was overruled by the court. A motion for a new trial was made and overruled, and the court imposed a fine of one hundred dollars and sentenced the defendant to confinement in the county jail for a term of thirty days.

In our opinion the court erred. The defendant, by the affirmative act of the court, was denied her constitutional right to be present at every stage of her trial. It may be said that the verdict of the jury was the important event of the trial, and concerned the defendant more than all of the precedent proceedings.

The argument is made that the defendant was not prejudiced by the error of the court. This is a stock argument, so often repudiated by this court that we deem it unnecessary to comment upon it in this case.

True, the defendant was on bond, but it is clear that she had not forfeited her bond by voluntarily absenting herself; on the contrary, she was absent by the express permission of the court.

In *Garman v. State*, 66 Miss. 196, 5 So. 385, is announced the rule and its application.

Reversed and remanded.

STEVENS, J. (dissenting). The record in this case affirmatively shows that the city of Tupelo introduced sufficient evidence to warrant the jury in finding be-

yond every reasonable doubt that the defendant was guilty of the misdemeanor here charged. The defendant offered no testimony whatever, and therefore I presume she has no defense on the facts. The jury reached the only verdict which, under the law and facts of this case, would have been proper. This verdict, it is true, was returned into court in the absence of both the accused and her counsel. I am perfectly willing to concede that the defendant had a right to be present, and this right the court could not willfully or arbitrarily deny to her. In this case, however, the circuit court, after concluding the business of the day and after announcing that all parties and witnesses would be discharged until eight thirty o'clock the following morning, thereafter reconvened his court for the purpose of receiving the verdict of the jury then deliberating upon this case. When the learned circuit judge adjourned his court, he, of course, had no intention of denying and did not thereby necessarily deny, this defendant of her privilege to tarry and determine for herself whether the jury would report. The record shows that the adjournment for the day was taken at four o'clock p. m. and, without lingering to determine whether the jury would report, the accused left for her home, and the circuit judge did the very natural and humane thing of accepting this verdict in the absence of the accused, rather than keep the jury locked up overnight. The defendant in this case does not say by her bill of exceptions that she desired or intended to poll the jury, and she does not by this appeal attempt to challenge or impeach the verdict; that is to say, she does not even now contend that the verdict as returned was not the unanimous verdict of the jury. She simply relies upon the technical proposition that she was not present when the verdict was returned, and this irregularity my Brethren have dignified by classing it as a fatal and reversible error. To this I cannot assent. It must be borne in mind

that this is a misdemeanor case and not a felony. In such cases the weight of authority sustains the view that the presence of the defendant at the reception of the verdict is not necessary. "In prosecutions for misdemeanor the weight of authority seems to be that it is not necessary that the defendant should be personally present at the reception of the verdict." Encl. of Plead. & Prac. vol. 22, p. 928, and the authorities cited in the footnote. The case is altogether different from that of *Garman v. State*, 66 Miss. 196, 5 So. 385, relied upon in the majority opinion. In the *Garman* Case the accused was denied the right to be present during the trial simply because he was a witness in the case. In that case the court denied the accused the constitutional right of being confronted by the witnesses against him, as also the right to conduct his defense. In *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195, our court on this point said:

"The right of the defendant to be present, proceeds upon the presumption that he is in custody, and has no power to be present, unless ordered by the court to be brought into court. But, under our law, he may waive that right. If he is not in custody, so as to be deprived of the power to attend, it would seem that the reason of the rule as to his right to be present would fail; for he is voluntarily absent when he ought to be present, and cannot complain of the consequence of his own voluntary act. His voluntary absence must be taken to be a waiver of his right to be present. . . . Hence, though the verdict in his absence was irregular, so far as his being present, and in the power of the court, to submit to its judgment, yet no prejudice was done to his rights, and he can take no benefit from his own illegal act."

So said our court in a felony case, and there is a vast difference between misdemeanors and felonies. The right of the accused to be present at the reception of a verdict in a misdemeanor case is certainly not a

constitutional right. Our court has held squarely that it is not a constitutional right even in a felony case, for this court, speaking through WHITFIELD, Chief Justice, in *Sherrod v. State*, 93 Miss. 774, 47 So. 554, 20 L. R. A. (N. S.) 509, observes that:

"The right to be present when the verdict is received is not a constitutional right, but a very sacred legal right, which may, as indicated, be waived under the conditions stated in the first proposition."

So it is then that even though appellant were denied the right to be present, this was not the denial of a right guaranteed by the Constitution, and the court certainly had jurisdiction to proceed. In this case the presence of the bond should be regarded as the presence of the accused. This court has recently held that the defendant on bond in a misdemeanor case must attend upon the regular term of the court, and that even though such defendant attended court two or three days and had temporarily left the courtroom to attend to business when his case was called, he has no right to complain at the action of the trial court in proceeding to the trial of his case. *Williams v. State*, 103 Miss. 147, 60 So. 73. My Brethren, I fear, have reversed this rule by requiring the court to keep up with the defendant in such case instead of requiring the defendant to keep up with the court. In the case of *State v. Shepard*, an early Iowa case reported in 10 Iowa, 126, it was held that:

"When the defendant is convicted of an assault and battery, though charged with a higher offense, his presence when the verdict is returned is not required." "In trials for inferior misdemeanors, a verdict may be given in the absence of the respondent (who was defendant)." *Sawyer v. Joiner*, 16 Vt. 499.

The same holding is declared in the early case of *Warren v. State*, 19 Ark, 214, 68 Am. Dec. 214. In the notes to this last case I find this statement:

"The verdict of a jury in minor offenses or misdemeanors may be rendered and received in the absence of the accused" (citing several authorities).

As a practical proposition this procedure is more reasonable. Any other holding will necessitate twelve tired jurors and their bailiffs to spend many nights in the very uninviting quarters usually prepared for jurors in our courthouses. Take the present case as an illustration. Was it not more consonant with reason and common sense to receive the verdict of the jury in this case and thereby accord to the several jurors the society and shelter of their own homes rather than keep them incarcerated all night in order that a guilty "blind tigress" might have the satisfaction of hearing the report of the jury?

The case is essentially different from that of *Corbin v. State*, 99 Miss. 486, 55 So. 43, wherein Judge ANDERSON, speaking for the court, observes that, "The appellant had the constitutional right to be present when tried." In the *Corbin* Case the court tried the defendant while she was ill and in her absence. Mr. William E. Mikell, a law professor and writer of high standing, makes the following observation in reference to the verdict:

"When the jury is ready to report, they announced the fact to the officer in charge. He informs the court, which is supposed to be always open for the purpose of receiving a verdict, any hour of the day or night, including holidays and Sundays"

—and cites in this connection *State v. Atkinson*, 104 La. 570, 29 So. 279; *Modern American Law*, vol. 3, p. 328. If this be a correct statement—and I think it is—then every defendant on bond should take notice of this fact and place himself in position to cooperate with the circuit judge and officers of the court in receiving the verdict. It is said by HUGHES, District Judge, in *U. S. v. Shepherd*, 27 Fed. Cas. 1060 (Fed. Cas. No. 16,274), 1 Hughes, 520, that:

"The cases cited by prisoner's counsel only go to the extent of ruling that verdicts in trials for felony must be rendered in the presence of the prisoner. They do not invalidate verdicts rendered in the absence of the accused in cases of misdemeanor. . . . The old technicalities of the criminal practice have been gradually discarded, as the necessity for them decreased, and finally ceased; and now, the rules of the criminal practice are as little arbitrary and technical, and as reasonable and just, as they are in civil proceedings."

In the footnotes on page 686 of 12 Cyc. the statement is made that:

"At common law a privy verdict may be given in misdemeanors and in the absence of defendant (Bacon Abr. tit. "Verdict"; 1 Chitty, Cr. L. 636), and by consent of the parties, a verdict may be delivered at the judge's house, although beyond the limits of the county in which the trial was had (1 Chitty, Cr. L. 636)."

But, conceding the right of the defendant to be present and poll the jury, the irregularity in this case was harmless error for which this case should not be reversed. It did not prejudice the rights of the accused. There being, then, no invasion of her constitutional right, and the error assigned under the facts of this case being harmless, this case should be affirmed.

THORSEN v. ILLINOIS CENTRAL RAILROAD COMPANY.

[72 South. 879.]

APPEAL AND ERROR. *Bond. Insufficient amount. New bond.*

Where an appeal bond was defective because the penalty was too small, it was not a nullity and the appellant under Code 1906, section 92, so providing, had the right to file a new bond.

APPEAL from the circuit court of Montgomery county.

HON. J. A. TEAT, Judge.

Suit by W. A. Thorsen against the Illinois Central Railroad Company. From a judgment for the defendant, plaintiff appeals motion to dismiss; appeal overruled and appellant given time within which to file a bond in a penalty of not less than five hundred dollars and upon his failure to do so the case to be dismissed.

The facts are stated in the opinion of the court.

J. H. Price, for appellant.

Mayes, Wells, May & Sanders, for appellee.

SMITH, C. J., delivered the opinion of the court.

The bond here in question is not a nullity, but is simply defective because the penalty thereof is too small, so that, under section 92, Code 1906, appellant has the right to file a new one. The case of *Wofford v. Williams*, 69 So. 819, has no application. The trouble in that case was that the paper filed with the clerk below had not been approved by him.

The motion will be overruled, and appellant given fifteen days within which to file a bond in a penalty of not less than five hundred dollars; and, upon his failure so to do, the cause will stand dismissed.

Dismissed.

LAY v. SHORES, PRESIDENT OF BOARD OF SUPERVISORS, ET AL

[72 South. 881.]

COUNTIES. Road bonds. Notice. For three weeks next preceding.

Notice by a board of supervisors of its intention to issue bonds of a road district, was not published as required by Laws 1910, chapter 149, section 2, which requires that the notice shall be published for "three weeks next preceding the meeting at which the board proposes to issue bonds," where more than one week intervened between the last publication and the day fixed for the proposed action of the board, although notice was published for three consecutive weeks.

APPEAL from the chancery court of Tallahatchie county.**HON. JOE A. MAY, Chancellor.**

Suit by J. H. Lay against J. A. Shores president of board of supervisors and others. From a decree for respondents, complainant appeals.

Appellant instituted a suit in chancery to enjoin the appellees from acting in their official capacity in issuing, executing, and delivering bonds of a road district of Tallahatchie county, composed of supervisors' districts Nos. 4 and 5 of said county. From a decree sustaining a demurrer to the bill, this appeal is prosecuted.

Gary & Rice, for appellant.

A. E. Weinstein, W. R. Woods and J. M. Kuykendall, for appellees.

COOK, P. J., delivered the opinion of the court.

It is our opinion that all of the assignments of error save one are totally without merit. The record shows, that the notice given by the board of supervisors of their intention to issue the bonds in question did not measure up to the requirements of the statute. The notice required in this case is prescribed by section 2 of chapter 149, Laws of 1910. The notice in this case was published in three

issues of the Tallahatchie Herald, a weekly newspaper of the county. The first publication was on May 4, 1916, the second, on May 11th, and the third, on May 18th. The notice was to the effect that the board of supervisors proposed to issue bonds to the amount of two hundred thousand dollars at its regular meeting on June 5th, if twenty per centum of the qualified electors did not, in the meantime, petition against the issuance of the bonds. It thus appears that the notice was not published for the time required by the statute. The statute requires the notice shall be published "for three weeks next preceding the meeting at which the board proposes to issue such bonds." The notice for the three weeks nearest to the time the board of supervisors proposed to issue the bonds was not given—more than one week intervened between the last publication and the day fixed for the proposed action of the board. This complication could have been avoided by the legislature, but we are not permitted to inquire the reasons prompting the legislature to require the publication of the notice "for three weeks *next* preceding the meeting"—we know that it is so, and the record shows that the notice does not square with the legislative requirement.

Reversed and remanded.

GULF & S. I. R. Co. v. UNITED STATES CAST IRON PIPE &
FOUNDRY. Co.

[72 South. 882.]

1. SHIPPING. *Special contract. Offer. Acceptance. Indefiniteness.*

Where in response to an inquiry asking the ocean rates on cast iron pipe from Gulfport to Colon, the agent of a railroad not engaged in ocean transportation quoted a rate on five thousand tons; this at most was only an offer which required acceptance to become binding.

Statement of the case.

[112 Miss.]

2. SHIPPING. *Special contract. Indefiniteness.*

A contract simply for a certain ocean freight rate on a certain number of tons, not only does not allow division of the shipment but is too indefinite to allow the shipper to demand transportation by steam, rather than a sailing vessel, and shipment and delivery at any certain date.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Suit by the United States Cast Iron Pipes Foundry Iron Company. From a judgment for plaintiff, defendant appeals.

Appellee, who was plaintiff in the court below, recovered a judgment against the appellant for damages in the sum of three thousand, four hundred and ninety-four dollars and sixty-five cents, based upon losses suffered by the alleged failure of appellant to carry out a contract of carriage on a quantity of cast-iron piping sold by appellee to the Panama Commission. Appellee alleges that by reason of appellant's failure to comply with its contract to ship piping from Gulfport, Miss., to Colon, Panama, that appellee was compelled to send it *via* New Orleans and pay one dollar per ton more ocean freight.

The record shows that on October 13, 1911, Morgan, the district freight agent of the Southern Railway Company at Chattanooga, Tenn., wired Brown, general freight agent of the defendant Gulf & Ship Island Railroad Company at Gulfport, Miss., as follows:

"Canal Commission calls for bids November sixth about five thousand tons one-inch cast-iron pipe. What is best ocean rate can offer."

To this message Brown wired the following reply to Morgan:

"Five thousand tons cast iron pipe Gulfport to Colon two dollars fifty cents net per ton."

On October 19th Morgan wired Brown:

"Your quotation cast-iron pipe Colon error in diameter; should be forty-nine thousand lineal feet twenty-

112 Miss.]

Statement of the case.

inch pipe in twelve foot lengths, weighing about one ton to length. How quickly could you handle commencing about December first? What is name steamship line?"

On november 4th Morgan wrote Brown that the appellee foundry company had decided to submit a bid for five thousand tons of pipe called for by the Canal Commission on November 7th—

"on basis of yqr quotation and also on basis of New Orleans rate of one dollar and ninety cents from Anniston and Birmingham, trusting to the carriers interested to arrange for the same rate to Gulfport as applies to New Orleans. What we are writing you particularly about is to let you know that the bid is to be submitted on this basis and request that you let us have as full information as possible regarding the facilities for handling the pipe from Gulfport to Colon in case U. S. Cast Iron Pipe & Foundry Company are the successful bidders."

The record shows that at that time the rate from Anniston and Birmingham to Gulfport was three dollars per ton as against one dollar and ninety cents to New Orleans. On November 7th Morgan wired Brown that appellee was the successful bidder and would "probably wish to forward pipe your way." Afterwards Morgan wrote Brown that the appellee had been awarded a contract for about two thousand and one hundred tons of pipe, and that he understood arrangements had been made to put in the one dollar and ninety cent rate to Gulfport. He has also advised that the contract with the government called for delivery "one-half in seventy-four days and complete shipment in one hundred and eight days."

Brown wrote the general freight agent of the Southern Railway Company with reference to getting the New Orleans rate applied to Gulfport, but when the application was made the Interstate Commerce Commission denied same on November 27th. Thereafter,

Statement of the case.

[112 Miss.]

on December 1st, Brown wrote Morgan that this rate had been denied, and that when the rate from Gulfport to Colon was quoted, no specific time within which delivery was to be made was mentioned, and ocean tonnage was hard to get, and that it would probably be impossible to get a steamer to carry the consignment in broken shipments and move the first shipment within the time required. He also advised that he could get a sailing vessel, but Morgan advised him that the contract made with the government required shipment by steamer.

Afterwards the inland rate to Gulfport was fixed to meet the New Orleans rate and became effective December 23d, and appellant avers that if shipped after that date it could not arrive in Gulfport in time to be loaded and shipped to Colon on a sailing vessel and reach its destination by the time required.

On December 14th the pipe company wrote appellant that sailing vessels would not be allowed for the shipment, and that he had therefore been compelled to send the pipe through New Orleans at a cost of one dollar per ton over the rate quoted by appellant from Gulfport to Colon, and that they would look to the appellant for reimbursement. On December 15th appellee wrote appellant that they understood that appellant had abandoned all hope of getting the first shipment through by steamer in time to have it reach Colon on the date required by the contract with the government, and that they had been compelled to arrange to send it *via* New Orleans. This letter reached appellant December 17th. On December 16th, before receipt of this letter, appellant wired appellee that the indications were that a steamer could be obtained about the 26th to leave port January 5th or 6th, and to advise how many tons appellee could get to Gulfport for that shipment, and called attention to the fact that the new rate to Gulfport was not effective until December 23d. On December 20th appellee wrote appellant that they

would be forced to continue shipments *via* New Orleans, as appellant's arrangements were too indefinite, and they could not run the risk of failing to get the pipe to Colon in contract time.

The appellant contends that it never entered into any contract with appellee or any one else to carry their freight from Gulfport to Colon, as it was not in the ocean freight business, but that its first telegram was merely a response to an inquiry from the Southern Railway. It is contended, also, that the amount mentioned in the telegram of inquiry differs from the amount to be shipped by the appellee, and that it was not advised that appellee's shipment was to be made in two installments, and, furthermore, that when the first inquiry was made it was not indicated that time was of the essence of the contract (if it was a contract), and that the requirement of the government forbidding the use of sailing vessels for such shipments was not communicated to appellant, and that the appellee's acceptance of the rate from Gulfport to Colon was entirely contingent upon the action of the Interstate Commerce Commission in meeting the New Orleans rate, and that appellee had contracted with another steamship company out of New Orleans before December 23d, the time when the new inland rate became effective to Gulfport, and that in any event since the first shipment was made by appellant under contract entered into before it could have taken advantage of the rate from Gulfport, appellant is not liable for any loss on that shipment.

Mayes, Wells, May & Sanders, for appellant.

Green & Green, for appellee.

STEVENS, J., delivered the opinion of the court.

We do not think the decree of the chancellor in this case can be upheld either on the law or the facts. A detailed statement of the history of the controversy between the parties hereto or the facts could be of

no interest to any one except the parties, and therefore without a prolonged discussion of the facts, we state briefly the reasons that impel us to reverse this case.

The initial telegram, in response to which Mr. Brown, the agent of appellant, quoted the ocean rate on the shipment of cast iron in question, constituted an inquiry from the district freight agent of the Southern Railway Company and not an inquiry from appellee or any other shipper. This inquiry simply asked the ocean rate on cast-iron pipe from Gulfport to Colon. Mr. Brown quoted a rate of two dollars and fifty cents net per ton on five thousand tons of cast-iron pipe. The responsive telegram of appellant's agent submitting this quotation constitutes an offer that was in fact never accepted by appellee or any one else. Appellant railroad company in the first place is not engaged in the business of ocean transportation, and this whole record demonstrates that both Mr. Brown and appellee never accepted a written contract of carriage from the Gulf & Ship Island Railroad Company from Gulfport to Colon. There was then no bill of lading or other contract of carriage whereby the Gulf & Ship Island Railroad Company ever obligated itself to transport the iron pipe in question. But conceding that, under the circumstances, appellant was obliged to make good its quotation of an ocean rate of two dollars and 50 cents, the record shows that appellee never intended to ship its pipe *via* Gulfport unless the Interstate Commerce Commission reduced the inland rate much lower than the rate that existed when Mr. Brown made his quotation. It is shown that the combined rail and water rate from appellee's plant to Colon *via* Gulfport was five dollars and fifty cents, while the combined rate *via* New Orleans was five dollars and forty cents. Appellee's bid to the Panama Canal Commission on November 6th could not have been submitted on any certain or fixed basis that allowed a profit without taking the New

Orleans rate as the minimum. It could not know and did not know whether the Interstate Commerce Commission would place the rate to Gulfport on a parity with that of New Orleans, and the first half of the shipment in question was actually made *via* New Orleans before the Interstate Commission made effective the reduction of the inland rate to Gulfport. If it should be conceded that appellant was obliged to make good its quotation, then as to the first half of the shipment actually made by appellee there is no damage whatever shown.

Furthermore, appellant's quotation was upon five thousand tons, whereas the Canal Commission awarded appellee a contract calling for a much smaller quantity, and appellee not only never accepted appellant's offer to carry five thousand tons, but was not in position to ship that quantity at all. We do not think the railroad company is shown to have had notice of the terms and conditions of the contract being awarded by the Canal Commission, and there was never at any time a definite agreement as to the time the shipment was to start or the time it was to be delivered, and certainly no agreement to divide the shipment in two parts. The proof shows that appellant could have secured sailing vessels for appellee's use, but that the use of such vessels was prohibited by the terms of the government's contract with appellee. In the initial telegram quoting the rate nothing was said about the agency to be employed from Gulfport to Colon except that it should be ocean transportation. There is no element of fraud or bad faith in this case. As a matter of fact there was never any definite, binding contract between the parties hereto, no meeting of their minds as to the exact amount of tonnage, the kind of ship, date of shipment, or time of delivery. Under this view of the case there can be no recovery whatever, and the decree of the chancery court is accordingly reversed, and a decree will be entered here in favor of appellant dismissing the suit.

Reversed.

W. M. CARTER PLANING MILL CO. v. NEW ORLEANS M. & C. R. CO. ET AL.

[72 South. 884.]

1. CARRIERS. *Discrimination. Justification. Previous contracts.*

The law is well settled by both federal and state courts, that contracts for interstate transportation at special rates, although entered into before the enactment of a law forbidding discrimination in freight rates, becomes void upon the enactment of such a statute.

2. CONSTITUTIONAL LAW. *Impairing obligation of contracts. Application.*

While the Federal Constitution, article 1, section 10, prohibits any state from passing a law impairing the obligation of contracts, this inhibition does not apply to acts of congress in dealing with interstate matters.

APPEAL from the chancery court of Jones county.

HON. SAM WHITMAN, JR., Chancellor.

Suit by Will Carter Planing Mill Company against the New Orleans, Mobile & Chicago Railroad Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Whitefield & Whitefield, for appellant.

All the counsel says about discrimination we admit to be sound law, but there can be no discrimination when there is no body to discriminate against. In other words, when the contract was made, it was, because of the two facts stated in the bill, and admitted by the demurrer, perfectly legal; and that the laws is, and counsel will not deny it, that if, when the contract was made, it was legal and valid, it cannot be made illegal or invalid by subsequent legislation or any subsequent change in public policy. That we are stating the law correctly let the authorities speak.

Green Hood on Public Policy, Rule 5, page 5, expressly declares that when a contract is valid when made, no subsequent statute or change in public policy can make it invalid.

In the case of *Stevens, etc. v. Southern Pacific Company*, 29 L. R. A. 751, it is decided that: "If for no other reason, this act of the legislature cannot be relied upon to assist respondents' case, for it was passed subsequent to the making of the contract, and, if the contract was valid when made, no subsequent act of the legislature can render it invalid."

It is laid down as an elementary principle in Green Hood on Public Policy, that if a contract conforms to the public policy of the state when made, a change in public policy will not avoid it. *Wilkinson v. Cook*, 44 Miss. 367; *Griswold v. Illinois Central Railroad Co.*, 24 L. R. A. 647. See note to *State v. Loomis*, 21 L. R. A. 789; See also *Laurel Cotton Mills v. Gulf & Ship Island Railroad Company*, 37 So. 134, showing that this rate was not a discrimination at all when made.

We submit to the court, therefore, with perfect confidence that if the contract was valid when made, it cannot be made invalid by any law, change of the law, or any change in public policy, and was therefore a perfectly valid contract which can be specifically enforced.

This really ends this case, and makes the overruling of this demurrer necessary.

Flowers, Brown, Chambers & Cooper, for appellee.

These lumber shipments were interstate shipments, made as alleged in the bill in accordance with freight tariffs filed with the Interstate Commerce Commission. The contract under which this suit was brought was made and entered into January 8, 1907, with appellee as one party thereto and the Mobile, Jackson & Kansas City Railroad Company as the other. The property of the Mobile, Jackson & Kansas City Railroad Company was acquired by the appellee New Orleans, Mobile &

Chicago Railroad Company on December 1, 1909, and on January 10, 1910, the alleged contract was repudiated by it.

We have already quoted at length from the complainant's bill which proceeds upon the theory that since he held this alleged contract with the Mobile, Jackson & Kansas Railroad Company the rate could not be changed as to him and he should be permitted to reap the benefits of his contract. That he should be permitted to go on and operate under his contract at five dollars per car while others in the same business paid ten dollars and fifteen dollars per car for the same service. In other words to get directly at the gist of the proposition he ought to be permitted to stop cars at his plant for five dollars per car while others paid ten dollars for the same service, thus giving him, as he boldly asserts in his bill of complaint, an "advantage" over his competitors.

It is indeed surprising that the distinguished and learned counsel on the other side should seriously contend for such a proposition. To continue to carry out the terms of the contract would be to violate the spirit as well as the letter of the law, for it gave appellant an advantage over his competitors equal to from five to ten dollars per car. To insist on its continuance is to insist on the continued violation of the law and the receipt of an unlawful, unfair and improper rebate. Counsel seek to avoid this conclusion by saying that at the time this contract was made there was no other plant on the line and consequently no competition. Be all that as it may, at the time of the breach by appellee, other plants of a similar nature had been erected and were in active competition with appellant. The bill specifically alleges this, and states that this contract gave appellant a peculiar advantage over these competitors. Appellant seeks to justify this advantage possessed by him in the way of a special reduced rate by a reliance on his contract. This cannot be done. No

matter what his contract may have provided; no matter how valid and binding it may have been when entered into, the minute it became an instrument operating in favor of appellant and against his competitors, giving to the former an advantage over the latter in the way of a cheaper freight rate for the same class of service, it became null and void. Not only did it become null and void as a rate proposition but appellant would have placed himself in the criminal class if any advantage had been accepted under it. This case is almost identical with the Armour Packing Company case. In that case the Armour Packing Company made a contract with the C. B. & Q. Railroad Company for the transportation of a cargo of oil from Kansas City to New York. At the time the contract was made the rate was twenty-three cents per hundred pounds. Before the cargo moved, however, the rate was changed to thirty-five cents per hundred weight. Armour insisted on the twenty-three cent rate as provided in the contract regardless of the subsequent charge in the tariff. The Railroad Company acceded to the demand and protected the rate as provided in the contract. The shipment moved on the lower rate and Armour was indicted and convicted and fined fifteen thousand dollars. There was an appeal and the case was affirmed in the circuit court of appeals. 82 C. C. A. 135, 183 Fed. 1, 14 L. R. A. (N. S.) 400 and note. The action of the circuit court of appeals was affirmed by the supreme court. 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. Rep. 428.

The note writer in the note 14 L. R. A. (N. S.) 400 in commenting on the effect of the decision in the *Armour case*, *supra* says:

"The United States supreme court, in affirming the above decision—*Armour Packing Company v. United States*—has settled the law to be that a contract for a freight rate less than the rate afterwards established by the carrier in accordance with the provisions of the Interstate Commerce Act cannot be upheld on the

ground that, at the time the contract was entered into, the rate therein provided was the legally established rate." (52 L. Ed. 681.)

We refer to the Armour case and the notes thereon in 14 L. R. A. (N. S.) 400 and 52 L. Ed. 681, where all the authorities on the subject are collated, as furnishing ample authority to sustain the action of the chancellor in sustaining the demurrer to this bill.

It is contended by counsel that appellant constructed his plant on the line of appellee's road upon the strength of his contract for the rate. Perhaps he did. We have no reason to doubt this. But the Act of Congress of February 19, 1913. (ch. 708, 32 St. at Large 847), was in effect when his contract was made and of course read itself into it just as fully and completely as though set forth at length therein.

Counsel for appellant could have avoided the rash statement in their brief that "Wherever a contract is legal when made, it can never become illegal by virtue of the passage of any law by Congress"—by informing themselves that the law was in effect years before appellant made his contract. We are indeed surprised that learned counsel should make a statement of this kind even if the act itself had been passed by Congress subsequent to the making of the contract. The provisions in the Federal Constitution which prohibits any state from passing a law impairing the obligation of contracts does not extend to Congress. The inhibition extends only to the states and not Congress. The provision is that "No state shall pass any law impairing the obligation of contracts."

"This prohibition, it will be noticed, is directed only against the states, and there is no other clause in the Constitution laying a like inhibition upon Congress. It follows, therefore, that if congress should pass a law, falling within the scope of its jurisdiction, and not obnoxious to any other provision of the Constitution, the court would be obliged to sustain it, notwithstanding

ing its effect might be to impair the obligation of existing public or private contracts." Black Constitutional Laws, 605, citing authorities.

"The prohibition against passing any laws impairing the obligation of contracts is a limitation solely upon the state government and does not affect that of the United States." Putney on Constitutional Laws, 166. Citing authorities.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the chancery court of Jones county, where the appellant W. M. Carter Planing Mill Company filed its bill, claiming fifty thousand dollars as damages for the breach of a contract covering switching or stoppage charges on cars consigned to its mill at Laurel. A demurrer to the bill filed by the defendant New Orleans, etc., R. Co. was sustained by the lower court, and the complainant appeals here.

The appellant alleged in its bill: That on January 18, 1907, it entered into a contract with the appellee through the Mobile, Jackson & Kansas City Railroad Company which company was succeeded by the appellee, covering a dressing or planing of lumber in transit arrangement at Laurel. This contract, among other things, provided:

"That in all cases when the shipper may so direct, said direction to be inserted in the bill of lading covering shipment, the railroad company will deliver to the planing mill company, at its planing mill at said Laurel, all undressed lumber received by it for transportation over its said railroad to Laurel, and points beyond reached by its own rails, or the rails of its connection, to be planed or dressed at said mill and returned to the railroad company for further transportation: . . . Provided, however, that the rates hereinabove provided for shall be subject to such change at all times as may be required by the law, or the order of the railroad commissions, to the jurisdiction of

which the railroad company is subject, either state or Federal," etc.

That on or about January 8, 1910, the appellee railroad company failed and refused to carry out said contract. That one of the most important terms in said contract, and upon which it relied and rested, was the stipulation that the defendant would grant freight rates from points of origin to destination, and would only make a charge of five dollars per car for switching cars to complainant's plant, thus enabling complainant to compete with other such plants on the line of the railroad where the switching charge was from ten to fifteen dollars per car. That complainant was doing a large and profitable business by reason of the rate of five dollars per car for switching, and that its profit on each car by reason of such stipulated rate was from five to ten dollars, and that its business was largely increased over its competitors on other roads who were required to pay the larger shipping charge. That the denial of such rate to the complainant ruined and destroyed its then profitable and flourishing business. That complainant was doing a prosperous business, and its monthly profits were ten thousand dollars and that by reason of the advantage it had in the switching rate, its business would have steadily increased. The defendant railroad company demurred to the bill; and while the demurrer appears to be very lengthy, it really contains only one distinct ground, and that is, that the bill, on its face, seeks to enforce an illegal contract.

To state the case more briefly: The milling company had a written contract with the railroad company, providing that if the milling company would locate its plant on the railway line of appellee, and give its lumber hauling business to appellee, the appellee would furnish cars and shipping facilities to appellant at a certain rate of five dollars per car. This arrangement was entered into and carried out by the parties until

other planing mills were located along the railway of appellee, and after the enactment of the Federal Interstate Commerce Act, forbidding discrimination in freight rates, and providing a severe penalty upon the shipper and the carrier for the violation thereof. These lumber shipments in question in this case were interstate shipments and, of course, are governed by the laws enacted by Congress. When the Federal Interstate Commerce Act, forbidding discriminations in freight rates, became effective, as to the parties here, the appellee railroad company refused to further furnish appellant cars at the said five dollars rate agreed upon in the contract, for the reason that other shippers on the appellee's railroad line were charged a higher rate for the same service, and that to comply with the contract made with the appellant, in giving appellant the lesser rate agreed upon in the contract, would be a discrimination which is forbidden and made unlawful by the Federal act. But the appellant contends that, even though to carry out the contract between appellant and appellee would be a discrimination in freight rates, and unlawful, under the act of Congress, yet the appellant should be allowed to recover because the contract between appellant and appellee was legal and valid at the time it was entered into, as there was no discrimination at that time, and that it cannot be made illegal or invalid by subsequent conditions or legislation. That to deny to appellant the right to the discrimination in the freight rate under its contract with appellee would be "impairing the obligation of contracts" in violation of the Constitution. In other words, the appellant admits receiving a discriminating freight rate in violation of the Federal law, but contends that it should be allowed to continue to enjoy this special rate in violation of law because it had contracted for such rate before the law against discrimination became effective as to appellant. We can-

not agree with the contention of the appellant. The contract entered into provides:

"That the rates hereinabove provided for shall be subject to such change at all times as may be required by the law, or the order of the railroad commissions, to the jurisdiction of which the railroad company is subject, either state or Federal."

When the freight rate was fixed by the Railroad Commission for interstate traffic, it appeared that the rate charged to other shippers was greater than that named in the contract between appellant and appellee, and we think, under the terms of the contract, the appellee railroad could properly refuse to follow the old rate given appellant under the contract and adopt the general freight rate fixed by law. But regardless of this latter provision of the contract, the law is well settled by both Federal and state courts that contracts for interstate transportation at special rates, although entered into before the enactment of a law forbidding discrimination in freight rates, becomes void upon the enactment of the statute. In *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, the United States supreme court said:

"There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. It is said that if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncer-

tain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish."

The note writer, in commenting on the *Armour Case*, *supra*, in 14 L. R. A. (N. S.) 400, says:

"The United States supreme court, in affirming the above decision . . . has settled the law to be that a contract for a freight rate less than the rate afterwards established by the carrier in accordance with the provisions of the Interstate Commerce Act cannot be upheld upon the ground that, at the time the contract was entered into, the rate therein provided for was the legally established rate."

We find the same rule announced in Michigan Upper Peninsular Pig Iron Rates Matter, 26 Interst. Com. Com'n R. 284.

The act of Congress here in question was effective in February, 1903 (Act Feb. 19, 1903, ch. 708, 32 Stat. 847 [U. S. Comp. St. 1913, secs. 8597-8599]). At the time the contract was made between the parties in this case, 1907, it was the law, and should be read into it as if written therein. The law supersedes the contract, in so far as granting a discriminating freight rate, and renders it null and void.

While the Federal Constitution, article 1, sec. 10, prohibits any state from passing a law impairing the obligation of contracts, this inhibition does not apply to the acts of Congress in dealing with interstate matters. As to whether or not a state legislature could effectively impair the obligation of contracts by the enactment of a subsequent statute in a case of this kind, where the subject dealt with is affected with a public use and might come within the police power of the state, we do not express an opinion, but we do hold

here, following what seems to be the well-settled law on the subject in both state and Federal courts, that the appellant has no right to recover under the facts of this case, because his contract is illegal and void.

Affirmed.

YAZOO & M. V. R. Co. v. JACOBSON.

[72 South. 889.]

1. CARRIERS. *Special damages. Notice to carriers.*

Where a cotton buyer of limited means and credit had purchased forty-seven bales of cotton to fulfill his contract for future delivery of one hundred bales, when he shipped the forty-seven bales, informed the railroad agent that he was loaded up with one hundred and fifty bales on hand and that if he did not get the forty-seven bales shipped through immediately he would be blocked from doing any further business; this was not sufficient notice to the railroad company to warrant his recovery against it for delay in delivery, special damages on account of the suspension of his business for twenty days for want of finances and credit, because of his inability to move out the cotton he had on hand his line of credit being exhausted.

2. SAME.

In order to recover special damages from a carrier for delay in shipment, it ought to clearly and certainly appear that at the time of the making of the contract of shipment, the railroad company had reasonable notice of the special circumstances rendering such damages the natural and probable result of the delay in the delivery of the shipment.

APPEAL from the circuit court of Coahoma county.

HON. W. A. ALCORN, Judge.

Suit by L. Jacobson against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Mayes, Wells, May & Sanders, for appellant.

Manard & Fitzgerald and *Greer & Green*, for appellee.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the judgment of the circuit court of Coahoma county, Miss., against appellant in favor of appellee, for the sum of one thousand six hundred seventy-four dollars and seventy cents and costs, awarded as damages on account of the failure of the appellant to deliver forty-seven bales of cotton shipped from the station of Merigold to Clarksdale, within a reasonable time. The appellee is a cotton buyer of limited means and credit, who had his office in Clarksdale, Miss., and had been engaged in the business about six years in that territory. It is shown by his evidence that some time prior to the 8th day of November, 1912, the appellee, L. Jacobson, had made a contract of sale for future delivery of one hundred bales of cotton of a stipulated grade and quality to Sudduth & Co. of Vicksburg, Miss., and on the 8th day of November, not then having in his possession the necessary number of bales of cotton to complete delivery under his contract, he proceeded to Merigold, and there, during the 8th and 9th day of November, 1912, succeeded in purchasing forty-seven bales of cotton from sundry persons and procured the same to be delivered to the appellant railroad company to be transported to Clarksdale, Miss., and there delivered to the People's Compress. Appellee claims that he told the agent of the railroad company that the cotton had been purchased to make up the one hundred-bale lot which he had contracted to sell, and expressed his anxiety to have the cotton forwarded promptly to Clarksdale, and the agent promised to forward it promptly. A portion of the cotton (twelve bales) was forwarded to Clarksdale at once, but the remainder of the cotton was not sent forward for sev-

eral days, and after all of the cotton reached Clarksdale, it was not in fact actually delivered to the People's Compress until November 29th, about twenty days after it was turned over to the carrier at Merigold, the point of shipment. The appellee did not suffer any loss or damage on account of any fluctuation in the price of the cotton. It had already been sold by him for future delivery, at a fixed contract price before he bought it, and he was enabled to deliver it and did deliver it, under his contract for the sale of it, within the time prescribed, and he received for the forty-seven bales of cotton all that he could have received for it, if it had been delivered more promptly.

It further appears that the appellee, as a cotton buyer, had a line of credit of about fifteen thousand dollars. He had on hand several lots of cotton, and especially a one hundred-bale lot uncompleted under a contract of sale already made to Sudduth & Co. of Vicksburg. Appellee, on the 9th day of November, 1912, at Merigold, Miss., purchased several lots of cotton, aggregating forty-seven bales. This purchase exhausted his line of credit until he could move out some of the cotton already on hand. Upon the immediate reshipment of any of the cotton on hand, he could draw a draft on consignees and rehabilitate his line of credit to that extent. The forty-seven bales of cotton purchased at Merigold were designed to fill out the one hundred-bale shipment under contract, and if the cotton reached Clarksdale within a reasonable time, appellee's business would go smoothly on, but if unreasonably delayed, such delay would block up his business, tie up his bank account, and prevent him from exercising his calling until the shipment arrived and he could turn it over under the contract. This paralyzation of business not only extended to the forty-seven bales, but to all the cotton on hand, because of the fact that the forty-seven bales were intended to fill out the different other contracts so that the whole could be moved and other cotton pur-

chased. The plaintiff in the court below claimed that the delay in the shipment of forty-seven bales of cotton put him and his office force entirely out of business for a period of twenty days, as he had no finances nor credit with which to run his business until the forty-seven bales of cotton could be delivered. He testified that his services when operating his business were worth in profits as much as one hundred dollars per day; that is, that he would make that much per day in profits when engaged in buying and selling cotton in the usual course of business. He also claimed that his office force of two persons was compelled to remain idle for the twenty days.

With the above state of facts submitted to the jury, a verdict for one thousand six hundred seventy-four dollars and seventy cents was awarded against the appellant, from which it appeals here.

It appears from the record in this case that the verdict and judgment against the appellant are based largely upon the claim of the appellee, Jacobson, that the unreasonable delay in delivering the forty-seven bales of cotton to him at Clarksdale rendered his financial condition such that he was unable to carry on his business until the delivery of this cotton was completed. In other words, the appellee contends that because he was limited in his finances and credit, the delay in the delivery of the cotton prevented him from doing business; that the negligence of the appellant railroad company was the proximate cause of this condition; and that the damage resulting to him growing out of this condition is chargeable to the appellant railroad company for its negligence in delaying the shipment of cotton. We do not think the damages awarded the appellee on account of the suspension of his business for twenty days for want of finances or credit were reasonably contemplated by the parties at the time of the acceptance of the shipment. But the appellee claims that he is entitled to one hundred dollars per day as profits

on his services, and the wages paid to his office force, as special damages; the nature and circumstances of which he claims to have given notice to the appellant railroad at the time he contracted to ship the cotton from Merigold to Clarksdale. We find from a thorough examination of the testimony in the record, regarding this alleged notice of special circumstances by the shipper, that the appellee, Jacobson, said to the agent of appellant at the time the cotton was accepted for shipment:

"I told him (the agent) from whom I bought the cotton, and I told him, I says, 'I am loaded up with one hundred and fifty bales here in Clarksdale, and if I don't get the forty-seven bales of cotton immediately, by Monday or Tuesday, you will block me off from doing any business; please ship that ahead immediately.' He says, 'I have got a car standing here, and that cotton will leave to-night; that was the 9th, Saturday night.'"

It appears that the above constitutes the notice of the special conditions existing at the time of the acceptance of the shipment by the appellant railroad company.

We do not think that this is sufficient notice to the railroad to warrant the appellee's recovering the special damages in this case. In order to recover the special damages claimed here, it ought to clearly and certainly appear that at the time of the making of the contract the railroad company had reasonable notice of the special circumstances, rendering such damages the natural and probable result of the delay in the delivery of the cotton. *Hadley v. Baxendale*, 9 Ex. 311; *American Express Co. v. Jennings*, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708. The claim by appellee that the railroad company, under the facts here, should pay him for becoming financially disabled to carry on his business is, to say the least of it, a very peculiar and unusual contention. We do not say that recovery cannot

be had in this character of cases when adequate and sufficient notice of the special conditions is given at the time of the acceptance of the shipment, though such ruling would be rather far-reaching in its effect, and make it hazardous to the common carrier to undertake such shipments when notice of the peculiar circumstances is given; but we hold in this case that the notice given by the appellee to the appellant railroad was insufficient to justify the infliction of such special damages. *American Express Co. v. Jennings*, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708; *Barnes v. Western Union Telegraph Co.*, 27 Nev. 438, 76 Pac. 931, 65 L. R. A. 666, 103 Am. St. Rep. 776, 1 Ann. Cas. 346; *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 52 So. 843, 29 L. R. A. (N. S.) 194, 140 Am. St. Rep. 47; *Moses v. Autuono*, 56 Fla. 499, 47 So. 925, 20 L. R. A. (N. S.) 350; *Mitchell v. Clarke*, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; *Western Union Telegraph Co. v. Cooper*, 10 Am. St. Rep. 778, note; *Van Winkle & Co. v. Wilkins*, 12 Am. St. Rep. 304, note; *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Cates v. Sparkman*, 73 Tex. 619, 11 S. W. 846, 15 Am. St. Rep. 806.

The judgment of the lower court is reversed, and the cause remanded.

Reversed and remanded.

WILDER v. HARRIS.

[72 South. 890.]

PARTNERSHIP. *Actions. Pleading and proof. Variance.*

Where a declaration alleged that the defendants were partners in a contract for the purchase of land, but the testimony showed that the land was purchased by one of the defendants for himself alone, there was a variance between the pleadings and the proof and there could be no recovery, since a plaintiff may not declare upon a joint contract and recover upon a several one.

APPEAL from the circuit court of Sunflower county.

HON. F. E. EVERETT, Judge.

Suit by Mrs. R. A. Wilder against F. M. & M. C. Harris. From a judgment on peremptory instruction for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

M. B. Grace, for appellant.

James L. Williams, for appellee.

SYKES, J., delivered the opinion of the court.

The appellant in this court was the plaintiff in the court below. Suit was filed in the circuit court of Sunflower county against F. M. & M. C. Harris for the recovery of five hundred dollars the amount of a draft given by F. M. Harris. The declaration alleged that F. M. & M. C. Harris purchased certain lands in Texas, through F. M. Harris, and that in partial payment of same F. M. Harris gave a draft for five hundred dollars on the Bank of Ruleville, signed "F. M. & M. C. Harris, per F. M. H." When the draft reached Ruleville, under the direction of M. C. Harris payment was refused. The declaration alleges that the defendants were partners in the contract for the purchase of this land.

The testimony, however, shows that the land was purchased by F. M. Harris for himself alone. The court

granted a peremptory instruction for the defendants after the introduction of the testimony for the plaintiff. The contract sued on was a partnership contract; the proof showed it was the individual undertaking of F. M. Harris. There was a variance between the pleadings and the proof. It is well settled in this state that a plaintiff may not declare upon a joint contract and recover upon a several one. *Miller v. Bank of Miss.*, 34 Miss. 412; *Kimbrough v. Ragsdale*, 69 Miss. 674, 13 So. 830. There is no merit in the contention of the appellees that the appellant has not sufficient interest in the draft to maintain this suit.

Affirmed.

THOMPSON, AUDITOR ET AL. v. KREUTZER.

[72 South. 891.]

1. TAXATION. "Ownership." "Privilege." "Property." "Right of ownership." Value. Statute. Validity. Privilege tax.

Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. In a strict legal sense property is synonymous with the right of ownership, and means one's exclusive right of possessing, enjoying and disposing of a thing.

2. SAME.

Property may also be and under section 112, Constitution 1890, requiring property to be taxed according to its value, is used to signify "things owned." In order that a thing may be owned, some one must, of course, have a right to ownership thereof.

3. SAME.

A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself.

Opinion of the court.

[112 Miss.]

4. TAXATION. *By value. Statutes. Validity. Privilege tax.*

Chapter 112, Laws 112, imposes a tax on property and such tax not being in proportion to its value, violates section 112 of the Constitution of 1890, and is void.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Bill for injunction by A. L. Kreutzer and others against Duncan L. Thompson, auditor and others. Demurrer to bill overruled, and appeal granted to settle principle of the case.

Chapter 112 of the Laws of 1912 provides that:

“There is hereby levied an annual privilege tax, or occupation fee, of twenty cents per acre upon each person, association of persons, or business firms and corporations pursuing the business of buying, owning or holding more than one thousand acres of timber land or lands in this state: Provided, that where such lands are taxed with a five cent acreage tax for levy purposes, said levy tax shall be deducted from the tax hereby imposed.

Geo. H. Ethridge, Assistant Attorney-General, for appellants.

Green & Green, for appellees.

SMITH, C. J., delivered the opinion of the court.

Appellees filed their bill in the court below, praying that the auditor and treasurer be enjoined from collecting from them a tax of twenty cents per acre upon certain lands owned by them, imposed by chapter 112, Laws 1912. To this bill a demurrer was interposed, overruled, and an appeal granted to settle the principles of the case.

One of the grounds upon which it is sought to enjoin the collection of this tax is, that the statute imposing it violates the provision of section 112 of the Constitution that “property shall be taxed in proportion to its value.”

The attorney-general, who appears for appellants, admits in his brief that if the tax is one on property the statute is void, but claims that it is not such, "but is purely a tax upon the privilege of ownership."

Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. Discarding, then, the word "privilege" and substituting therefor the proper word "right," the distinction here sought to be made by the attorney-general is one without a difference. In a strict legal sense, "property" (from the Latin word *proprius*, meaning belonging to one; one's own) is synonymous with the "right of ownership" and means one's exclusive right of possessing, enjoying, and disposing of a thing. Burdick on Real Property, 2; 2 Blackstone, 2; 6 Words & Phrases (First Series) 5697 et seq.; 23 Am. & Eng. Enc. Law (2d Ed.), 259; 32 Cyc. 647.

Property may also be, and in the section of the Constitution here under consideration is, used to signify "things owned." In order that a thing may be owned, some one must, of course, have a right to the ownership thereof. A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property.

It follows from the foregoing views that the tax here in question is on property, and, not being in proportion to its value, chapter 112, Laws 1912, by which it is imposed, violates section 112 of the Constitution and is void.

Affirmed and remanded, with leave to appellants to answer, if they so desire, within thirty days after the filing of mandate in the court below.

Affirmed and Remanded.

HUDDLESTON v. McMILLAN BROS. ET AL.

[72 South. 892.]

1. **CONTRACTS. *Validity. Non-payment of tax. Bills and notes. Transfer. Bona fide purchaser. Defenses.***

Contracts made by a party who has not paid his privilege tax are valid since April 21, 1906, at which time the statute (Ann. Code 1892, section 3401), declaring all contracts made by a party who had not paid his privilege tax void was amended (Code 1906, section 3894) and the legislature omitted from the statute the provision, declaring contracts void when made by a person who had not paid his privilege tax, and the penalty for such failure was made a fine and imprisonment only.

2. **BILLS AND NOTES. *Transfer. Bona-fide purchaser. Defenses.***

Where defendants gave their promissory note payable to bearer for the purchase price of a stallion, in a suit on said note by a *bona-fide* purchaser thereof for value without notice, the defendants cannot set up as a defense that there was a failure of consideration, in that the stallion did not measure up to the guaranty of his procreating qualities, or that the seller of the stallion was a "vendor of horses" at the time he sold to appellees the stallion in question and had not paid a privilege tax to carry on the business of "vendor of horses" in this state and that therefore the contract as evidenced by the note was void. Since in such case our anti-commercial statute, Code 1906, section 4001, does not apply.

APPEAL from the circuit court of Atalla county.

HON. H. H. RODGERS, Judge.

Suit by W. H. Huddleston against McMillan Bros. and others.

From a judgment for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Somerville & Somerville and *J. A. Teat*, for appellant.

S. L. Dodd and *R. H. & J. H. Thompson*, for appellee.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the circuit court of Attala county, where W. H. Huddleston, plaintiff below and appellant here, sued McMillan Bros. *et al.*, appellees here, on three notes, and from a judgment in favor of the defendants below this appeal is taken by Huddleston. The facts shown by this record are as follows: The appellee McMillan Bros., and five or six other persons, executed and delivered three promissory notes, aggregating two thousand dollars, which notes were payable to bearer. The notes represented the purchase price of a stallion sold by one Dodd to the appellees. The stallion was delivered to the appellees, and the notes were afterwards assigned for value to the appellant, W. H. Huddleston, without notice of any controversy as to the consideration between the makers and the payee. When the first note became due, demand was made for payment and was refused, whereupon appellant filed his suit against all the makers of the notes, claiming that he was an innocent holder of the notes, and demanded judgment thereon. The appellees claimed, as a defense in the lower court, and urge the same contention here, that there was a failure of consideration, in that the stallion did not measure up to the guaranty of his procreating qualities; and, second, that the notes were not delivered; third, that they were not signed by some of the defendants; and, fourth, that Dodd, the seller of the horse, was a "vendor of horses" at the time he sold to appellees the stallion in question, and that he had not paid a privilege tax to carry on the business of "vendor of horses" in this state, and therefore the contract as evidenced by the notes was void. The lower court agreed with the appellees in the latter contention, and granted a peremptory instruction to the jury to find for the appellee, and judgment was accordingly rendered in the lower court, from which this appeal is prosecuted.

We have carefully examined the authorities, and find the law is well settled in this state that contracts made by a party who has not paid his privilege tax are valid since April 21, 1906, at which time the statute (Ann. Code 1892, section 3401), declaring all contracts made by a party who had not paid his privilege tax void, was amended (Code 1906, section 3894), and the legislature omitted from the statute the provision, declaring contracts void when made by a person who had not paid his privilege tax, and the penalty for such failure was made a fine and imprisonment only. *Young v. State Life Insurance Co.*, 91 Miss. 710, 45 So. 706; *Sullivan v. Ammons*, 95 Miss. 196, 48 So. 244. In speaking of contracts made in violation of law, Justice TERRAL said, in *Bohn v. Lowery*, 77 Miss. 424, 27 So. 604:

“The illegality, whether arising by the common law or from the statute, affects the act or contract with like infirmity. An exception to this rule of law prevails where the penalty is imposed on the offending party merely for the purpose of revenue and not to prohibit the act done, or avoid the contract.”

The statute here in question imposes a penalty of fine and imprisonment merely in aid of the revenue of the state. The case of *Quartette Music Co. v. Haygood et al.*, 67 So. 211, is not in point here, for the very plain reason that in that case the court was dealing with the question of the failure of a foreign corporation to record its charter with the secretary of state, as required by chapter 24, Code 1906; and the decision of this court in that case does not conflict with the view expressed by this court in the cases referred to above in dealing with contracts of persons carrying on business in this state without first having paid the privilege tax.

Under the proof in this case, and the law there is no merit in the other contentions of appellees. *Phoenix National Bank v. Saucier et al.*, 102 Miss. 293, 59 So. 91.

We think the lower court erred in granting a peremptory instruction for the appellees; therefore the judgment of the lower court is reversed, and a judgment entered here for the appellant for the notes sued on.

Reversed and judgment entered here.

Reversed.

WASHINGTON v. CITY OF JACKSON.

[72 South. 893.]

INTOXICATING LIQUORS. *Possession with intent to sell. Evidence. Sufficiency.*

Before a conviction can be had under section 1797, Code 1906, as amended by chapter 114 of Laws 1908, providing that, "It shall be unlawful for any person to have in his possession any intoxicating liquors with the intention or for the purpose of selling the same, or giving it away in violation of law," there must be evidence of a sale or intent to sell such liquors and the fact that defendant has a large quantity of liquor in his possession alone is not sufficient to convict.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Virginia Washington was convicted in the municipal court of unlawfully having in her possession intoxicating liquors with the intention of selling them, and from the judgment on appeal to the circuit court again convicting her, she appeals.

Appellant was convicted in the municipal court of the city of Jackson on an affidavit which charged that she—"did then and there willfully and unlawfully have in her possession vinous, spirituous, malt, alcoholic, and intoxicating liquors, with the intention and with the purpose of selling same."

Section 1797 of the Code of 1906, as amended by chapter 114 of the Laws of 1908, provides that:

“It shall be unlawful for any person in this state to have in his possession any intoxicating liquors with the intention or for the purpose of selling the same or giving it away in violation of law.”

By the ordinance the city of Jackson has made this law an offense against the city. The testimony showed that she had in her possession at the time the affidavit was made twenty-one pints of whiskey and ten quarts of beer and two corkscrews, and a number of empty whisky bottles and beer bottles were found on the premises. She claimed that part of the liquor belonged to other parties, and it is not shown that she ever sold any liquor at any time. She appealed to the circuit court, and was again convicted, and carried her case to the supreme court on appeal from this last conviction.

L. M. Burch, for appellant.

L. C. Hallam, for appellee.

HOLDEN, J., delivered the opinion of the court.

The proof in this case brings it within the rule announced in *Stansbury v. State*, 98 Miss. 406, 53 So. 783, and *McComb City v. Hill*, 100 Miss. 193, 56 So. 346, 39 L. R. A. (N. S.) 534. Therefore the judgment of the lower court is reversed, and the appellant discharged.

Reversed.

WESTERN UNION TELEGRAPH CO. v. KOONCE.

[72 South. 893.]

1. TELEGRAPH AND TELEPHONE. *Negligence. Sufficiency of evidence. Punitive damages. Willful negligence.*

Under the facts set out in its opinion the court held that the acts complained of constituted mere negligence on the part of the defendant, not characterized by wantonness or willful wrong.

2. SAME.

In such case no punitive damages could be recovered, mere brusqueness of an agent not amounting to insult and being no grounds in law for the infliction of punitive damages against his principal.

3. TELEGRAPHS AND TELEPHONES. *Mental suffering. Willful wrong.*

No action lies for the recovery of damages for mere mental suffering, disconnected from physical injury and not the result of willful wrong.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Suit by G. B. Koonce, Sr., against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Sullivan, Conner & Sullivan and *J. B. Harris*, for appellant.

R. S. Hall and *Watkins & Watkins*, for appellee.

HOLDEN, J., delivered the opinion of the court.

The appellee, G. B. Koonce, Sr., recovered a judgment in the circuit court of Forest county for one thousand and five hundred dollars against the appellant Western Union Telegraph Company, as punitive damages for the alleged willful negligence and insulting conduct of the appellant's agents in handling a money order telegram from Hattiesburg, Miss., to Caldwell,

Tex.; and from this judgment the telegraph company appeals here.

The facts in this case, as disclosed by the record, briefly stated, are: That the appellee, Koonce, on June 27, 1914, called at the Hattiesburg office of the appellant telegraph company, which office was in charge of George Wolfe, manager and delivered twenty-seven dollars to Wolfe to be transferred and delivered by telegraph to appellee's son, G. B. Koonce, Jr., at Caldwell, Tex., and paid a charge of one dollar for the service. G. B. Koonce, Jr., appellee's son, was in jail at Caldwell on a misdemeanor charge, and it was explained to Manager Wolfe, of the telegraph company at Hattiesburg, that the money was being sent for the purpose of releasing young Koonce from jail at Caldwell. The message was delivered to the telegraph office at twelve-thirty p. m., Saturday, June 27, 1914. It was discovered afterwards, by wire communication, that Caldwell, Tex., was not a money order transfer office or pay station. The message was then sent to Dallas, Tex., at two p. m. the same day, and the telegraph office at Dallas had the Dallas Bank wire its correspondent bank at Caldwell to pay the money to young Koonce at Caldwell. This method of having the money paid at Caldwell was adopted by the appellant, but it seems that young Koonce had paid his fine by some other arrangement, and was released from jail about noon of the same day the message was filed at Hattiesburg. The bank of Dallas closed on Saturday the 27th of June at one o'clock, and did not receive the telegram in time to attend to the matter until Monday, June 29th, when it promptly wired its correspondent bank at Caldwell to pay the money to young Koonce, in care of Sheriff Hensley. The Caldwell Bank immediately notified Sheriff Hensley; but the money could not be delivered to young Koonce because he had left Caldwell and could not be located by the sheriff. The Caldwell Bank held the money for three days, accord-

ing to custom, and to see whether or not young Koonce would call for it, and then returned it to the Hattiesburg office through the same channels by which it had received it. The notice to refund the money finally reached the Hattiesburg office after some delay, and it was paid over to the attorney of the appellee. In the meantime, Mr. Koonce had called several times at the Hattiesburg office, and inquired whether or not the money had been delivered to his son, and was assured by Mr. Wolfe, the manager, that it had been delivered. Subsequently appellee Koonce was advised by mail that the money had not been delivered to his son at Caldwell, and he requested of Manager Wolfe a return to him of the twenty-seven dollars. Manager Wolfe did not return the twenty-seven dollars to the appellee at that time, because he had not been advised so to do by the Dallas office; but he again wired the Dallas office for information and authority to refund the money to Mr. Koonce, and finally received a reply at seven-thirty p. m. on the 6th of July, authorizing him to refund the twenty-seven dollars to Mr. Koonce, which he could not then do because Mr. Koonce had left the telegraph office and did not return. Afterwards the manager paid the money to the appellee's attorney, who called for it.

It appears that the telegraph office at Hattiesburg made a mistake in wiring the money direct to Caldwell, as there was no telegraph pay station there, but it also appears improbable that the twenty-seven dollars could have been delivered to young Koonce before he was released from jail, even if Caldwell had been a pay station. The proof in this record shows that some of the delay in handling and returning this money order message was due to legal holidays and Sunday at Dallas.

The appellant also claimed that Manager Wolfe mistreated him when he called at the office to inquire about whether or not the money had been delivered to his son, in that the manager's conduct toward appellee was characterized by insult, abuse, and oppression, which

consisted in the manager's refusing to courteously reply to all of the inquiries of appellee, and that Wolfe told him "that there is no use in your worrying about it," and would not further talk to appellee about the telegram; that this behavior of the manager was insulting to him; that he thought Mr. Wolfe "was liable to jump on him;" and that "he looked like he had been cutting up meat when I asked him anything."

With this state of facts before the lower court, instructions were given to the jury that it might find punitive damages for the plaintiff, and the jury responded with a verdict of one thousand and five hundred dollars in punitive damages. No actual damage, outside of the one dollar paid for toll, was claimed or proved by the appellee.

After a most careful examination of the facts and circumstances in this case, it is clear to us that the mistake made by the appellant telegraph company in accepting the message to be wired to its Caldwell office when in fact it had no pay station there, and the agent stating that the money had been delivered, and the subsequent delay in refunding the twenty-seven dollars to appellee, constituted mere negligence on the part of the agents of appellant. In no view can it be said that the negligence was characterized by wantonness or willfulness, and consequently no punitive damages can be recovered. The claim of appellee that the conduct of Manager Wolfe at Hattiesburg toward him was insulting, abusive, or oppressive is not sustained by the proof in this record. It appears that the elder Koonce was naturally very much worried about the welfare of his son, who was in jail at Caldwell, Tex., and he was attempting to assist and relieve him in the quickest way possible by sending him money by wire with which to pay his fine, and, being very anxious about whether his son had received the money, he called frequently upon Manager Wolfe at Hattiesburg and made inquiry, about the matter. It must be admitted that even an agent of

a telegraph company may sometimes be worried and provoked by frequent questions from patrons, yet it seems from the testimony here that Mr. Wolfe, the manager, was reasonably courteous and responsive to Mr. Koonce, and that he did not at any time abuse, insult, or oppress him. The appellee seems to have been more disturbed by the looks of Mr. Wolfe than by his words or actions. The appellee testified, as to Mr. Wolfe, that "he looked like he had been cutting up meat when I asked him anything." We cannot safely impute insult and oppression from the looks of a person. If this were held to be the rule, the right to recover punitive damages would be so enlarged as to permit enormous verdicts, resulting in grave injustice to many, merely on account of appearances. The agent here may have been brusque and brief, but "mere brusqueness of the agent, not amounting to insult, is not ground, in law, for the infliction of punitive damages against his principal."— *Railroad Co. v. Machine Co.*, 71 Miss. 663, 16 So. 252; *Railroad Co. v. Gill*, 66 Miss. 39, 5 So. 393.

The appellee claims damages here for mental worry. At the time appellee was worrying about his son being in jail, the boy had been released and had left that community. It is well-settled law in this state that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of willful wrong. *Telegraph Co. v. Rogers*, 68 Miss. 748, 9 So. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; *Duncan v. Telegraph Co.*, 93 Miss. 500, 47 So. 552; *Telegraph Co. v. Ragsdale*, 71 So. 818.

Taking the testimony in this case as a whole, we think the proof is not sufficient to warrant the infliction of punitive damages, and that the lower court erred in permitting the jury to assess exemplary damages. The judgment of the lower court is reversed, and the case remanded.

Reversed and remanded.

HUNT v. CITY OF TUPELO.

[72 South. 895.]

CRIMINAL LAW. Presence of accused. Reception of verdict.

Where in a trial of defendant for keeping liquor for unlawful purposes the jury returned a verdict of guilty to the clerk after court had adjourned for the noon hour and in the absence of the judge the defendant, and her counsel, without any agreement of the defendant or her counsel that the verdict might be returned in such manner, or any agreement whatever with reference to the return of the verdict by the jury and the defendant did not in any way waive her presence when the verdict was returned, the return of the verdict under such circumstances was reversible error as denying to accused, her constitutional right to be present at every stage of the trial.

APPEAL from the circuit court of Lee county.

HON. CLAUDE CLAYTON, Judge.

Annie Hunt was convicted of keeping malt liquors, beer, etc., and for unlawful purposes and appeals.

The facts are fully stated in the opinion of the court.

Boggan & Leak and *W. A. Blair*, for appellant.

There is a very important question involved in this case, viz: that of returning the verdict to the clerk of the court, the defendant and her counsel, after court had adjourned for the noon hour, and until one thirty o'clock that afternoon, without the consent or approval of defendant or her counsel, and no notice was given her that the jury was ready to render a verdict in her case. It seems that there is, in the special bill of exceptions and motion for a new trial, a mistake as to the time that adjournment was taken, as they both state that it was in the evening, at the close of the day's session, but this is an error made by counsel who represented this appellant and also Metie Henry Borum, who in preparing the motions, got them reversed, and this case was the one decided at the noon hour, or during the adjournment be-

tween the morning and the afternoon session of court, and the stenographer's notes show that the case was tried in the forenoon.

This defendant has the right, guaranteed to her by section 26 of the Constitution of Mississippi, to be present, and this applies as well to misdemeanors as to felonies. We realize that it is the law that where the defendant voluntarily absents herself from the trial, it may proceed without her being present, and in misdemeanor cases she can be tried in her absence, where she has notice of the time and place fixed for the trial and fails to appear, but when she does appear and defends the charge against her, she is entitled to all the protection the law affords her, and it cannot be said that she was voluntarily absent, after court had adjourned for the day, and all parties had been discharged and announcement to that effect had been made, and no notice was given her that her presence was needed or expected.

There are a number of cases that hold that when a defendant is physically unable to be present at a trial, that she does not voluntarily absent herself, and if tried under such conditions she is deprived of her constitutional right.

It is held in *James v. State*, 55 Miss. 57, that a refusal to poll the jury on request in either a civil or criminal case is reversible error. It occurs to us that a failure to allow the defendant, or her counsel, to be present when the verdict is returned, is a more serious error than to refuse to poll the jury, as they are not present and could not ask for it to be polled, or protect defendant's rights with reference to any other things that might occur at the time.

In the case of *Garmon v. State*, it was held as error to exclude Joe Garmon who was being tried jointly with others, from the court room on account of the fact that he was a witness in the case. This was a misdemeanor, and the court said that he had a right to be present and advise and assist his counsel.

We also call the court's attention to the cases of *French v. State*, 63 Miss. 386; *Ryan v. Cranch*, 66 Ala. 636; *Chester v. Bower*, 56 Cal. 46; *LaRue v. Russel*, 26 Ind. 386; *Crow v. Peeters*, 63 Mo. 429; *Snider v. Haas*, 14 Ore. 174; *Garmon v. State*, 66 Miss. 196.

In the case of *Corbin v. State*, Justice ANDERSON speaking, says: "Furthermore, the appellant had the constitutional right to be present when tried, such right being guaranteed by the twenty-sixth section of the Constitution, which applies to trials of misdemeanors as well as felonies. In a trial for misdemeanor, the accused may, by his own fault or misconduct, waive the right to be present." This case is found in 55 So. 43.

"In misdemeanors as in felonies, the defendant has a right to be present during the trial, and unless this right is expressly or impliedly waived, a trial or conviction in his absence is invalid." 12 Cyc. 528.

We submit that the court had no right, after adjournment, to receive the verdict of the jury in the absence of defendant and her counsel without notice to either of them; and the defendant, after having once been placed in jeopardy, is entitled to a discharge at the hands of this court; we therefore ask that the judgment of the lower court be reversed and the defendant discharged.

C. P. Long, for appellee.

The first assignment of error in this case is that the verdict was delivered to the clerk after court had adjourned for the noon hour, and in the absence of the court, the defendant, and her counsel.

This assignment of error and also the one in the case of *Mittie Henry Borum, Appellant, v. The City of Tupelo*, Appellee, present the same questions as is presented in the case of *Sarah Woods, Appellant v. City of Tupelo*, Appellee, and I have argued and briefed the question in that appeal which is now pending in this court, as fully as I know how, and I respectfully refer the court to brief and argument in that case.

Like all other law points, when once raised in whiskey cases, an immediate rush for the same cover was made by all defendants who were unfortunate enough to be convicted.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the circuit court of Lee county where the appellant, Annie Hunt, was convicted of keeping malt liquors, beer, for unlawful purposes, in the city of Tupelo.

It appears from the record that the jury in the lower court returned a verdict of "guilty" to the clerk after court had adjourned for the noon hour, and in the absence of the judge, the defendant, and her counsel, without any agreement of the defendant or her counsel that the verdict might be returned in such manner, or any agreement whatever with reference to the return of the verdict by the jury; nor did the defendant below in any other way waive her presence when the verdict was returned. The rule announced by this court in banc November 6, 1916, in *Sarah Woods v. City of Tupelo*, 72 So. 895, is applicable to the case before us now.

Therefore the judgment of the lower court is reversed, and the case remanded.

Reversed and remanded.

DELTA INS. & REALTY AGENCY ET AL. v. INTERSTATE MORTGAGE & BOND CO.

[72 South. 895.]

ACCOUNT. *Discovery. Facts warranting relief.*

Where a bill charged business dealings between the parties for several years, that the accounts between them are mutual accounts and are complicated, and that the status of the accounts was within the knowledge of defendants, and praying for a

discovery and accounting and decree accordingly and the bill further charges that all the defendants were indebted to complainant in a gross sum, a part of which was due and owing by two of the defendants and the other part by the other defendant and that on account of the relation of all parties to each other the indebtedness was a joint liability, and that complainant had no knowledge as to the amount due by each and that a discovery was necessary; such facts alleged in the bill of complainant were sufficient to warrant the lower court in granting the relief prayed for.

APPEAL from the chancery court of Leflore county.
HON. JOE MAY, Chancellor.

Suit by the Interstate Mortgage & Bond Company against the Delta Insurance & Realty Agency, W. S. Barry and S. S. Steele. From a decree overruling demurrer to the bill, the first defendant appeals.

This suit was instituted in the chancery court by the appellee against the appellant and W. S. Barry and S. S. Steele. The bill alleges that in January, 1911, the appellee's predecessor entered into a contract of agency with Barry under the terms of which he was made the general agent in Mississippi and Tennessee for the appellee's predecessor; that in October, 1911, the appellant company was formed with Barry and Steele as the owners thereof, and that the new company took over the contract of general agency and continued to handle the business just as it had been handled by Barry. In the meantime the appellee had come into all the rights of its predecessor. During the course of business the bill alleges that large sums of money belonging to the appellee came into the hands of Barry and the appellant company, and that at the termination of their business during the month of June, 1913, after giving credit for all amounts remitted, there was still a balance due by Barry and the agency of more than eleven thousand dollars, but that the appellee's books did not show the amount chargeable against each, and for that reason discovery and an accounting would be necessary, and that, the accounts being mutual and involv-

ing many items of the debit and credit and offsets and claims and counterclaims, the matter was one peculiarly for chancery jurisdiction in order that proper relief might be given.

The bill also alleges that Barry and Steele were stockholders and directors of the corporation, which was insolvent, and which had no property out of which it could be made to respond to a decree against it, and that the assets of the agency had been disbursed in dividends and salaries improperly paid to the directors and stockholders and that Barry and Steele are liable because as directors they authorized and permitted such payments, and as stockholders received such payments, when the agency was insolvent and owed appellee a large amount.

The prayer of the bill is for a decree against Barry for the amount found to be due by him and decree against the agency for the amount found to be due by it, and, since the agency is insolvent and its assets have been dissipated, that a decree be entered against Barry and Steele for the amount due by the agency. There was a demurrer to the bill, which was overruled, and an appeal granted to the supreme court.

Gwin & Mounger, for appellant.

Percy & Percy, for appellee.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of Leflore county overruling a demurrer to the bill filed by the appellee in which it seeks a discovery and accounting between the appellants and appellee. The appeal was granted for the purpose of review of the action of the lower court. The reporter will state the facts.

The bill charges business dealings between the parties for several years, that the accounts between them are

mutual accounts and are complicated, and that the *status* of the accounts is within the knowledge of appellants, and praying for a discovery and accounting and decree accordingly. The bill further alleges that both the Delta Insurance & Realty Company and Barry and Steele were indebted to the appellee in a gross sum, a part of which was due and owing by Barry and Steele, and the other part by the Delta Insurance & Realty Company, that on account of the relation of all the parties to each other the indebtedness was a joint liability, and that the appellee had no knowledge as to the amount due by each, and that a discovery is necessary.

We think the facts alleged in the bill of the appellee are sufficient to warrant the lower court in granting the relief prayed for. Section 556, Code of 1906; 1 C. J. 618, 619; *State v. Brown*, 58 Miss. 835; *Compress Co. v. Levy*, 83 Miss. 774, 36 So. 281; *Waller v. Shannon*, 53 Miss. 500; *Wright v. Shelton*, *Smedes & M. Ch.* 399; *Tribette v. Railroad Co.*, 70 Miss. 182, 12 So. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642.

Affirmed and remanded, and appellant granted sixty days within which to answer the bill.

Affirmed and Remanded.

BOUSLOG ET AL. v. CITY OF GULFPORT.

[72 South. 896.]

CONSTITUTIONAL LAW. *Municipal corporations. Due process of law. Notes. Special assessments. Statutes.*

Chapter 128, Laws 1916, being an act to authorize boards of supervisors and the mayor and board of aldermen or other governing bodies of municipalities to erect sea walls, breakwaters, and bulkheads for protection of public roads or streets extending along the beach or shores of any body of water and to lay special assessments on abutting property not to exceed one-half

of the cost of construction, and to issue bonds therefor, and empowering the mayor and commissioners of the city to prorate the assessment without any express rule therefor, and which does not provide for notice to owners either personally or by publication, to afford opportunity of hearing on and objection to the assessments, though section 7 of the act permits any person aggrieved by the order of any board to take bill of exceptions to the circuit court for trial on the record without a jury and in the absence of any such provision in the general law, is violative to both the state Constitution providing that no one shall be deprived of property, etc., except by due course of law, and that every person for an injury done him in his lands, etc., shall have a remedy by due course of law and to the similar provisions of the Federal Constitution; and the court could not say that the power granted to boards, etc., impliedly carried the right to prescribe the notice to be given nor that the bond issue could be upheld, regardless of the legality of the assessments.

APPEAL from the chancery court of Harrison county.

HON. W. M. DENNY, JR., Chancellor.

Suit by M. P. Bouslog and others against the city of Gulfport. From a decree for defendant sustaining a demurrer and dismissing the bill complainants appeal.

The facts are fully stated in the opinion of the court.

Hanum Gardner, John L. Heiss and L. M. Evans,
for appellant.

J. L. Taylor, for appellee.

STEVENS, J., delivered the opinion of the court.

The appeal in this case presents for decision the constitutionality of chapter 128, Laws of 1916, being an act to authorize boards of supervisors and the mayor and board of aldermen or other governing bodies of municipalities to erect sea walls, breakwaters, and bulkheads for protection of public roads or streets extending along the beach or shore of any body of water, and to levy special assessments and to issue bonds for the construction thereof. Appellants, as

taxpayers in and citizens of the city of Gulfport, exhibited their bill of complaint against the mayor and board of commissioners of the city of Gulfport, to restrain the issuance and sale of bonds in the sum of two hundred thousand dollars, which the said city is preparing to execute and offer for sale in pursuance of the terms and provisions of the act in question. In their bill, among other questions raised, is the averment that the act is unconstitutional and void for the reason that it attempts to authorize a special assessment of benefits against property adjacent to or abutting upon the proposed sea wall, and thereby to create or fix a lien upon complainants' property without giving to the complainants and other property owners a hearing, and without providing for any notice whatever. A demurrer interposed by appellees was sustained by the chancellor and from the decree dismissing the bill appellants prosecute this appeal.

The bill also avers that the act violates section 80 of the Constitution, in that it does not place any restriction upon the right of the board of supervisors or municipal authorities as to the size or amount of the bond issue or expenditure, and also that the municipal authorities have no power to exercise the right of eminent domain in acquiring the necessary land or right of way upon which to construct the sea wall, and especially the character of sea wall called for by the plans and specifications adopted by appellees in this case. It is unnecessary for us to notice any of the points argued by counsel for appellants, except the constitutional question which is presented by the failure of the statute to provide for any kind of notice to be given the owner, or to afford the property owners an adequate opportunity to be heard when the board assesses the benefits. The general scheme of this statute, briefly stated, is to authorize boards of supervisors, in case of a public road, and municipal authorities in case of a street, to construct a permanent sea

wall or breakwater to protect the highway, and, if the improvement necessitates an unusual expenditure of money, to provide the necessary funds by means of a general bond issue of the county or city, as the case may be, and to assess the abutting property owners with the benefits or enhanced value to their property produced or conferred by the improvement, not to exceed, however, one-half of the cost of the construction. In other words, the purpose of the act is to require adjacent property owners to pay one-half of the cost, and thereby to reimburse the county or city one-half of any bond issue under the act. So, in the instant case, the abutting property owners will be expected to defray one-half of the cost of the sea wall here proposed for the city of Gulfport. The complainants, amongst others, as interested taxpayers, will have a lien fixed upon their property unless the relief prayed for in this case is granted. The act authorizes special benefits to be assessed, not only against the adjacent real estate extending a thousand feet back from the water's edge, but also the assessment of any special benefit conferred upon telegraph, telephone, and pipe lines existing along the street in question and any other property of any kind that happens to be specially benefited. In assessing these benefits the mayor and commissioners of the city of Gulfport are empowered by the act to prorate the assessments as they deem just and proper, and no rule or guide whatever is given by the express terms of the act. This brings us then to a consideration of the failure of this law to provide for notice to the adjacent property owners.

We reluctantly, but confidently, regard the act here under review as obnoxious to both our state and Federal Constitutions. Nowhere in this act from beginning to end is any provision for or reference to any kind of notice, either personal or by publication. It is true that section 7 of the act provides that "any person aggrieved by the order of any board under this act"

may take a bill of exceptions, showing the particular facts and rulings of the board complained of, but the trial in the circuit court on appeal is restricted to the face of the record without the intervention of a jury. To be effectual, the party appealing from the order of the board would be required to incorporate in his bill of exceptions all the testimony offered before the board, as well as any pleadings or rulings of the board, and have this special bill of exceptions signed in a summary way. Back of all this, however, is the right of the aggrieved party to notice of the time and place when and where the board undertakes to assess benefits against his property and a reasonable opportunity to file objections and produce all needed testimony. There is no provision, either by this act or by any general law, fixing the time or the meeting at which the board by assessing benefits will render judgments against property owners. It is obvious that by the literal and express terms of the statute no notice whatever is required. By a literal compliance with the statute the board can proceed to assess the benefits, and thereby impose a lien upon complainants' property for a large and unusual tax, without giving any notice, and when the board has prorated or fixed the assessments and adjourns, its orders operate as a judgment against the property owners affected by the act. In fixing these assessments the board acts judicially, and its judgment, unless appealed from, is final. Our state Constitution expressly provides that no person shall be deprived of life, liberty, or property except by due course of law, and that:

“Every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.”

It is well known that similar provisions are embodied in our Federal Constitution. A judicial inquiry and the rendition of judgment without notice or opportunity to be heard is condemned by all the authorities. The

right to be heard in a case of this kind is a sacred right, older than our written Constitutions, and the preservation of which is simply further and permanently guaranteed by these well-known provisions of our federal and state Constitutions. The decisions of all the courts of the land conspire to safeguard this as one of the primary and fundamental rights of freemen.

Is this right then recognized and adequately protected by the act in question? We are asked to write into the statute a notice by implication. Counsel for appellees frankly concede that reasonable notice is necessary, and contend that, inasmuch as the power here granted is one conferred upon boards of supervisors and municipal boards having large administrative and judicial powers, the granting of the power carries with it the right by implication to prescribe the kind and character of notice to be given. To this argument, persuasive as it is, we are unable to give our assent. We wish it here kept in mind that no provision of the general law anywhere grants to the board the right itself to determine the kind or character of notice. If we hold that the act in question gives the power by necessary implication, then this court plainly and manifestly will be guilty of judicial legislation. It will be necessary for us to supply or interpolate into the act a vital and necessary element. And when we do so, what kind of notice will the board or the court supply? It is a matter of common knowledge that our Mississippi seacoast is largely a pleasure and health resort; that the beach property is owned by individuals and corporations; and that the interests of minors, trustees, guardians, executors, and non-residents will be directly affected by the enforcement of the act. What notice then will the board give to nonresidents, corporations, and persons under disability? The mayor and commissioners of Gulfport might prescribe one kind of notice and the board of supervisors of Harrison county a different notice.

There could be as many kinds of notice as there are municipalities and counties adopting the act. It is reasonably certain that some property owners cannot be reached except by publication, and in the making of this publication what provision will the board make looking toward placing a copy of the advertisement before the nonresident? A notice which is not authorized by this statute or any other general provision of law could not be classed as a legal notice. It would be a self-provided, homemade product, without the sanction of the Legislature and without uniformity. The employment of this act would entail large and unusual expense, and various kinds of property, including the homes of many citizens, would bear a heavy annual tax to defray the expense. Their right to notice and a hearing is a right founded upon natural justice.

Our court in the early case of *Donovan v. Mayor and Council of Vicksburg*, 29 Miss. 247, 64 Am. Dec. 143, declared unconstitutional and void an ordinance by which the city marshal of Vicksburg was authorized and directed to seize and sell all hogs running at large within the limits of the city, without providing for notice to the owner. Mr. Justice HANDY, speaking for the court, says:

“No process is required to be issued for the seizure or the sale, nor notice given to the owner, either actual or constructive, nor is there . . . opportunity given to him to appear and show cause, under any circumstances, why the ordinance should not be enforced against his property. The entire proceeding is summary, and calculated to deprive the party of his property in all cases without notice or trial. . . . Such being the oppressive use to which laws and ordinances of this nature may be employed, the Constitution has wisely interposed its interdict against their enactment, by the provision that no person ‘can be deprived of his life, liberty, or property, but by due

course of law.' . . . If such a power had been expressly conferred by the act of the legislature incorporating the city, it would have been obnoxious to the provisions of the Constitution and void; and much less can it be justified under any general powers conferred upon the corporation by their charter."

One of the leading American cases holding as unconstitutional and void a law, imposing an assessment for local improvements without notice to or a hearing granted the owner is that of *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. The learned opinion of EARL, J., in that case has been frequently quoted with approval in many of the subsequent American cases on this subject, and we add our tribute to the words employed by this jurist, and especially to the following:

"The legislature can no more arbitrarily impose an assessment from which property may be taken and sold than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written Constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. This provision is the most important guaranty of person rights to be found in the federal or state Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. *Weimer v. Bunbury*, 30 Mich. 201. This great guaranty is always and everywhere

present to protect the citizen against arbitrary interference with these sacred rights."

"It is very generally held that property owners are entitled to notice of an assessment and a hearing thereon, and that an improvement statute which makes no provision for notice and hearing is unconstitutional." 28 Cyc. 1145, and authorities in the footnote.

"The consensus of opinion is that it is necessary to the validity of a special assessment that somewhere along the line of the proceedings, notice be given to the owner and an opportunity afforded him to be heard in opposition or defense, and that statutes which make no provision for notice are unconstitutional." Hamilton on Law of Special Assessments, par. 145, 100, 101; *Stuart v. Palmer*, *supra*; *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825; Gray on Limitation of Taxing Power, par. 1165.

Our court in *Nugent v. Mayor & Aldermen of Jackson*, 72 Miss. 1040, 18 So. 493, quoted with approval Elliott on Roads and Streets, saying:

"The only defensible rule is that which requires that at some stage of the proceedings, before the judgment or decision becomes conclusive, the landowners should have notice, or the opportunity to be heard."

It has indeed been the uniform policy of this state for near a century to provide notice in all cases where private property is taken or damaged for public use, and likewise in all cases authorizing local improvements. This is evident by the well-known provisions for giving notice of the laying out or changing of public roads, in our drainage laws, in the building of sidewalks and paved streets within our municipalities, and in all eminent domain proceedings.

Legislation similar to this was held unconstitutional and void in *Ulman v. Baltimore*, 72 Md. 609, 21 Atl. 711, 11 L. R. A. 224, where the court observes:

"But it has been suggested that this order appealed from should be affirmed because, even had opportunity been given to the appellant to appear and be heard before the tax was imposed, no different result could have been reached. To this we cannot agree. The constitutional guaranty belongs to the individual by right, and not by the mere favor of the legislature or the sufferance of judicial tribunals. It is the duty of the courts to see that this right is not invaded under any pretext whatever when the subject is before them. Its value as a safeguard would speedily dwindle away, or, at least, become exceedingly precarious, if the privilege to assert it were made to depend upon the belief or the opinion of a judge that it would, if asserted, be available. It is a right of which a citizen cannot be deprived, and he may appeal to it whatever others may think as to the result of such an appeal."

In *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825, CARDWELL, J., speaking for the court, delivered a splendid opinion, reviewing the authorities and holding that an assessment for local improvement exacted by a municipal corporation, be void unless the person has an opportunity to appear and contest the legality, justice, and correctness of the proposed assessment. The case quotes with approval from Judge COOLEY, as follows:

"In discussing the question whether the right to be heard in tax cases is a right which is indefeasible (Cooley, Tax'n [1st Ed.] 265, 266), Judge COOLEY says: 'We should say that notice of the proceedings in such cases, and an opportunity for a hearing of some description were matters of constitutional right. It has been customary to provide for them as a part of what is "due process of law" for these cases; and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended, or could be construed, to sanction legislation under which officers might secretly assess one for any amount

in their discretion, without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed of taxing officers, that "it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose, without giving any notice to the owner. It is a power liable to great abuse," and, it might safely have been added, it is a power that, under such circumstances, would be certain to be abused. "The general principles of law applicable to such tribunals oppose the exercise of any such power." See, also, authorities cited in notes 1, 2, p. 266. Due process of law requires that he [the land owner] shall have a chance to interpose objection to the validity of the tax, or to the contention that his land is liable for it, or to the manner of assessing or collecting it, at some stage of the proceedings, before his property is irrevocably gone; and this before some authority competent to afford relief in case of invalidity or injustice. Mr. Black, in note to case of *Read v. Dingess*, 8 C. C. A. 398."

This holding is reaffirmed by that court in *Norfolk v. Young*, 97 Va. 728, 34 S. E. 886, 47 L. R. A. 574. We refer also to note, page 1201, to *Chicago, M. & St. P. R. Co. v. Janesville*, 28 L. R. A. (N. S.) 1124.

Counsel for appellees rely upon *Paulsen v. City of Portland*. 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637. There is a difference between that case and the case at bar. In that case the judgment of the city of Portland was attacked as unconstitutional because it made no provision for notice to the property owners affected by the laying of sewers and making improvements of this character under a general grant of power. The distinction that appeals to us is drawn by BEAN, J., in *Hood River Lumbering Co. v. Wasco County*, 35 Or. 498, 57 Pac. 1017, where the court observes:

“Cases like *Paulsen v. Portland*, 149 U. S. 38, 13 Sup. Ct. 750 [37 L. Ed. 637] and *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691, are wholly unlike the case at bar, because they involve the validity of proceedings by municipal corporations in improving streets and laying sewers under a general grant of power. It was held in these cases that the city charters were constitutional and valid, although they made no provision for notice to the property owners, but this holding was expressly put upon the ground that: ‘The city is a miniature state—the council is its legislature; the charter is its constitution—and it is enough if, in that, the power is granted in general terms, for, when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council.’ Mr. Justice BREWER, in *Paulsen v. Portland*, 149 U. S. 38, 13 Sup. Ct. 753 [37 L. Ed. 637]. But the power granted by the statute under consideration is vested in, and is to be exercised by, the county court, acting in a judicial, and not a legislative, capacity. It has no authority to prescribe the mode of exercising the power granted, or to supplement the statutory method of procedure. It can only execute the law according to its terms, and, as the statute undertakes to provide the entire method of procedure, it necessarily follows that, unless in its several provisions it is in conformity with the Constitution, and provides for due process of law, all proceedings had thereunder void. And the fact that in this particular case the plaintiff had knowledge of the proceedings, and appeared in the county court, is of no consequence in determining the question. The constitutionality of a statute must be determined by what can be done under it, and not what actually takes place. If by strict compliance with all its requirements, the property of an

individual can be taken from him without due process of law, the act is void."

The same distinction is evidently drawn by CARDWELL, J., in *Violett v. Alexandria*, *supra*, when he says:

"In every case that I have been able to examine which has gone to the supreme court of the United States, and in which the question under consideration was considered, that court has upheld the validity of the laws upon the ground that notice and hearing had been provided for, or held the laws to be unconstitutional and void because notice to the party to be affected and an opportunity to be heard were not provided for" (citing several authorities from the United States supreme court, including the Paulsen Case).

The requirement for notice has been consistently recognized by numerous decisions of the supreme court of the United States. In the earlier case of *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, Mr. Justice GRAY says:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. . . . When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much."

In *Londoner v. Denver*, 210 U. S. 385, 28 Sup. Ct. 714, 52 L. Ed. 1103, the court says:

"Where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportuni-

ty to be heard, of which he must have notice, either personally, by publication, or by a law fixing the time and place of the hearing."

In the instant case there is a special grant of power, not only to the governing body of municipalities, but to boards of supervisors, and indeed the option of putting the law into effect in any county is left exclusively with the board of supervisors. It cannot be said that the board of supervisors has the power of legislation, and by exercising a legislative function it can prescribe the kind of notice whereby the statutory power can be lawfully exercised. There is no provision in the act expressly conferring jurisdiction on any court to determine the legality of the assessment. It is also to be observed that in the cases of *Paulsen v. Portland* and *Londoner v. Denver*, *supra*, the decisions of the supreme court of the United States are put largely upon the point that the state courts had looked to the laws then under review, and had adjudged that these laws contained in themselves a sufficient requirement for notice. So, in the decision of the instant case, we are bound to observe the requirements of our own state Constitution, whose provisions we are sworn to uphold; and we find ourselves unable to square the act in question with the Constitution, precedents, and legislative history of our commonwealth. It may be observed that in the sea wall statute passed by the legislature of 1914 ample and express provisions for notice appear. Furthermore, this proposition of the necessity for some express provision for notice has been set at rest by the supreme court of the United States in the very recent case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 Sup Ct. 625, 59 L. Ed. 1027, and other decisions of that court therein quoted from. The court, by Mr. Justice PITNEY, declared invalid a Florida statute as violating the due process of law clause of the United States Constitution, and quoted

to approve a portion of the opinion in *Stuart v. Palmer, supra*. The court there says:

“Nor can extraofficial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: ‘It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.’ The soundness of this doctrine has repeatedly been recognized by this court. Thus in *Security Trust & S. V. Co. v. Lexington* [203 U. S. 323] 27 Sup. Ct. 87 [51 L. Ed. 204], the court, by Mr. Justice PECKHAM, said, with respect to an assessment for back taxes: ‘If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute’ (citing the New York case). So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 28 Sup. Ct. 47, 52 L. Ed. 134, 141 [12 Ann. Cas. 463], the court said: ‘This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.’ In *Roller v. Holly*, 176 U. S. 398, 409, 20 Sup. Ct. 410, 44 L. Ed. 520, 524, the court declared: ‘The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.’ And in *Louisville & N. R. Co. v. Central Stockyards Co.*, 212 U. S. 132, 144, 29 Sup. Ct. 246, 53 L. Ed. 441, 446, it was said: ‘The law itself must save the parties’

rights, and not leave them to the discretion of the courts as such.' "

The writer, having personal knowledge of our sea-coast, its demands and possibilities, duly appreciates the necessity for some kind of sea wall protection, and recognizes the necessity for legislation of the kind here attempted. But in laying down precedents that not only control the present but guide the future, the court cannot depart from a principle declared in Magna Charta, consistently and jealously guarded by courts, and effectually embedded as a part of the foundation structure of American jurisprudence.

It will not do to say that the bond issue in question can be upheld regardless of the legality of the special assessments. The primary scheme of the act is to require abutting property-owners to bear one-half of the cost, and if the act does not effectually provide a method for raising this one-half of the cost, the issue as a whole should not, in equity and good conscience, be authorized or upheld. It is not only a good roads measure, but essentially a local improvement measure. It is our judgment, therefore, that the act in question must be regarded as inoperative and void, and the decree of the learned chancellor will accordingly be reversed, the demurrer to the bill overruled, and the cause remanded, with leave granted appellees to answer the bill within thirty days after receipt of mandate by the clerk below.

Reversed and remanded.

SIMMONS v. HOPSON'S BAYOU DRAINAGE DISTRICT.

[72 South. 901.]

1. CONSTITUTIONAL LAW. *Drains. Assessment. Notice. Due process of law. Assessments. Confirmation. Venue. Power of Drainage commissioners.*

Under section 1700, Code 1906, as amended by Laws 1912, chapter 196, section 4, providing that, when drainage commissioners have completed their assessment, they shall file it with the clerk of the chancery court, and that the clerk shall publish a notice at least once a week for two successive weeks of the time set for hearing objections to assessments before the chancellor which time shall not be less than fifteen days or more than thirty days from the time of filing; such a notice is reasonable and valid.

2. SAME.

Under said act the chancellor had jurisdiction to hear the cause in any county of his chancery court district, inasmuch as the act provides that he may hear the cause in vacation, and does not provide expressly that such petition shall be heard in the county where the land is located.

3. SAME.

Act 1912, chapter 196, section 1698, expressly provides that the commissioners of a drainage district may make a new assessment of the benefits to be derived by each separate tract of land, and raise revenue therefrom according to the provisions of the law.

APPEAL from the chancery court of Coahoma county.
HON. JOE MAY, Chancellor.

Petition by Hopson Bayou drainage district for the confirmation of their assessment upon lands of the district. From a decree approving and confirming the acts of the commissioners, A. J. Simmons appeals.

The facts are fully stated in the opinion of the court.

D. W. Cutrer, for appellant.

This appellant insists that the notice of this hearing by the publication of notice for fifteen days is not suf-

ficient to put him on notice. It is, after all, a question of reasonableness, and two publications in a newspaper for two consecutive weeks is not sufficient to apprise the landowners that their assessments will be increased, and an added burden of taxation placed upon them.

The record shows that appellant's assessments of benefits have been practically doubled. While the total of bonds issued against the assessments of benefits are less than the amount of these benefits, still an opportunity of oppressive taxation is placed in the hands of the county drainage commission. At the pleasure of the commission, tax assessments for drainage purposes, may be increased to the point where they amount to confiscation.

The chancellor had no jurisdiction at this hearing. He set the hearing at Sumner, in Tallahatchie county, Mississippi instead of in Coahoma county, where this district lies. There is no authority of law for setting such a hearing in another county. In effect, this hearing is a suit and appellant is entitled to be heard in the county of his residence. Code, section 707; *Adams v. Kyzer*, 61 Miss. 407.

We call attention to the fact that the first set of commissioners made an assessment roll of this district; that the present commissioners alleged that there were mistakes and misdescriptions in the old roll, and they prepared a new one correcting the said mistakes and misdescriptions. How can they now come into court and say that the first set of Commissioners confused, "Amount of Benefits" with "Estimated Cost of Work," and find that the actual benefits to the lands of the Hopson's Bayou Drainage District through the construction of these drainage canals was much greater than as shown by these two assessment rolls? Why did not these Commissioners ascertain that fact when in 1912, they made the corrected roll?

It is respectfully submitted that these commissioners are now estopped from alleging that the assessment of

Brief for appellee.

[112 Miss.]

benefits on appellant's lands should now be increased, even in the face of the chancellor's ruling on the question of fact. To do so is to impeach their own classification. *People v. Green*, 90 N. E. 248, 242 Ill. 455.

The action of the commissioners in using the funds on hand to repair the damaged main canal was clearly illegal. Commissioners cannot undertake work in excess of the assessments of benefits on the lands of the district. *Badger v. Drainage District*, 31 N. E. 170. We respectfully submit that the ruling of the chancellor should be reversed.

Chas. W. Clark, for appellee.

Appellant contends that the notice of this hearing, by publication for two successive weeks in a local newspaper was, as to him, insufficient notice. He states that this is a question of reasonableness, and he impliedly argues that this court should hold that such notice is insufficient to give the chancellor jurisdiction.

It is difficult to understand what this contention is based on. The first publication of notice was made on April 13th, the second on April 20th, and the hearing was had on the 28th. Applying the rule laid down by section 1606 of the Code, excluding the 13th and including the 28th, we have fifteen full days. This fills the statutory requirement to the very letter. (Laws 1912, chapter 196, section 1700, page 228.)

If appellant means that fifteen days is not sufficient time, the short answer is, that it is the time fixed by the legislature.

It is argued by appellant that his assessment of benefits have been practically doubled, and that this law places an instrument of excessive taxation in the hands of drainage commissioners, and that they may use it to oppress him.

But the actions of the commissioners must be confirmed by the chancellor after a hearing, and even the

actions of the chancellor after a hearing, are subject to review by this court. Thus the appellant's constitutional rights are pretty well safe-guarded.

The allegation that the chancellor had no jurisdiction, because he set this hearing before himself at Sumner, Tallahatchie county, Mississippi, instead of in Coahoma county, is unsound.

To begin with, the hearing was in vacation, and it is well settled in this state, that where the chancellor has power to do any act "in vacation," that means anywhere in his court district that the chancellor may designate. Surely, if *habeas corpus* proceedings may be held by the chancellor anywhere in his district, matters *in rem* can be.

If it be argued that the "spirit" of this law be, that drainage hearings should be held in the county where the district is situate, it is a sufficient answer to state that the legislature did not say so. If the chancellor, who is generally pretty closely in touch with drainage districts, had any reason to apprehend contests, he would set the hearing in the county where the land is situate. If any landowner should telephone to the chancellor that there would be a contest and that numerous objectors desired to be heard, it is only reasonable to suppose that the chancellor would be glad to enter his order, re-setting the hearing at the court house of the county where the district lies, or at any place in the court district which would be most convenient to the objectors.

Section 707 of the Code has no application, for this is not a "suit." Even if it were, some landowner might contend that the "suit" was properly brought in Tallahatchie county, because he himself lived there.

Appellant raises the point that when the present drainage commissioners went on the lands of this drainage district, on October 4, 1912, and made a revised and corrected assessment roll, correcting the faulty descriptions of the first roll made by the old

commissioners, that no other or further rolls could be made; and that these present commissioners were now estopped to say that the old commissioners had made the mistake of supposing that "amount of benefits" meant, not the actual benefits to be derived from installing a drainage system, but the estimated cost of the work.

Here appellant completely misunderstands the purpose of the present drainage commissioners in making the corrected roll of date October 4, 1912. The commissioners were following chapter 202, Laws 1912, which provided a method of issuing the bonds of the drainage district for that part of the twenty per cent cash assessment which had not been paid in cash by the landowners. They followed the law strictly, and did what the law required. The fact that they assessed the lands in forty-acre blocks, instead of sections and half-sections, was due to the fact that many of the sections which had been assessed as a whole, had been cut up into smaller tracts, and the landowners did not know how to apportion the taxes among themselves. It fortunately happened that the old commissioners had assessed these lands in forty-acre blocks, but had lumped the assessments when they transcribed the assessment roll. All this data was before the chancellor, and he confirmed the action of the present commissioners in making these very meritorious corrections. The fact that only one landowner objected, clearly shows that the new arrangement gave satisfaction to the other landowners. The old roll, as can readily be seen, was capable of creating endless confusion. For instance, if section 1 were assessed at nine hundred and forty-three dollars and twenty-five cents, what proportion of that assessment must each of the half a dozen subsequent purchasers bear, when taxpaying time came? One tract of land might be bounded by the ditch; another might lie a mile distant. As for the tax collector, it is easy to imagine his troubles. The commissioners and

chancellor put an end to this confusion, by recasting the roll in its original form. The supreme court affirmed their findings. *Allen v. Drainage District*, 64 So. 418. Evidently, then, these commissioners, when they corrected the old roll, were simply putting the same exactly in the form it was in when the old commissioners first made it. Since they were strictly following a procedure laid down by statute for floating the bonds for the district for the remaining part of the assessment levied by the old commissioners, they were not called upon to inject into their procedure a series of experiments. One statute (chapter 202, Laws of 1912) prescribed how the commissioners might issue the bonds of the district for the balance due, instead of forcing the landowners to pay cash. Another statute (chapter 196, Laws of 1912) prescribed how, when the first assessment of benefits proved insufficient, another might be levied. Thus the two laws had nothing to do with each other, and the commissioners wisely refrained from embarking upon a double-barrelled procedure which involved the experiment of combining the two laws. Had they done so, there is no telling where they would have landed.

The case of *People v. Green*, 90 N. E. 248, does not sustain his contention. In that case, the landowner appealed from certain assessments on the ground that they were too high. A jury trial was had, and the jury raised certain of the assessments, and lowered others. The court held that when a landowner took an appeal on the ground that the assessments were too high, the assessments must either be lowered, or confirmed; that there was no authority to raise them still higher. The only remarks made by the court which even sighted in the direction of appellant's contention, were as follows:

"It manifestly would be unfair to the landowners who had filed objections to the classification on the ground his land was classified too high, after he had

appealed from the decision of the commissioners to the county court, to force him into a trial in that court, upon the question that his lands had been classified too low without any objection having been filed before the commissioners raising that question, and the drainage commissioners raising, on the appeal of a landowner, ought not to be permitted to stultify themselves and impeach their own classification by proving their classification was too low."

As will be seen, the remark of the court was merely *obiter*. It is a very slender reed for appellant to lean on.

HOLDEN, J., delivered the opinion of the court.

On April 12, 1916, the drainage commissioners of the Hopson's Bayou drainage district in Coahoma county made a new assessment upon the lands of the drainage district, under chapter 196, sections 1698 and 1700, Acts of 1912, and ordered the issuance of additional bonds of the drainage district in the sum of twenty-eight thousand three hundred and thirty-six dollars and fifty cents for new drainage work necessaery in cleaning, enlarging, and repairing the drainage system of the district, and in paying a balance due for work already done thereon. The commissioners then filed their petition with the chancery clerk of the county, praying that their actions in the premises be approved and confirmed by the court according to chapter 196, Acts of 1912; and the clerk proceeded to publish notice, once a week for two successive weeks, of the time set for the hearing of the cause, which time was not less than fifteen days nor more than thirty days from the date of filing the same, and the petition was heard by the chancellor in vacation, according to the notice, at Sumner, in Tallahatchie county, and not in Coahoma county where the land is situated. On the hearing the chancellor approved and confirmed the acts of the commissioners; and from this decree the appellant, A. J. Sim-

mons, one of the landowners in the Hopson's Bayou drainage district, appeals here, assigning three errors: viz.: First, that the notice of the hearing by publication for fifteen days is insufficient notice, unreasonable, and invalidates the act by denying due process of law; second, that the chancellor had no jurisdiction to hear the cause in Tallahatchie county, it being one of the counties of his chancery court district, but not the county in which the land is situated; third, that the commissioners in office in 1916 were different from those in office in 1911, when a prior assessment had been made, and that the new commissioners could not subsequently assess the land anew for the purpose of raising additional revenue to be used in repairing and maintaining the drainage district.

We hold:

First. That the publication of notice, for at least once a week for two successive weeks, of the time set for hearing objections to the assessments before the chancellor, which time was not less than fifteen days, nor more than thirty days, from the date of filing same, is a reasonable and valid notice as provided by the Legislature in section 1700, chapter 196, Acts of 1912.

Second. That the chancellor had jurisdiction to hear the cause in Tallahatchie county or any other county of his chancery court district, inasmuch as the act provided that he may hear the cause in vacation, and does not provide expressly that such petition shall be heard in the county where the land is located. *United States Fidelity Co. v. State*, 69 So. 1007; *Hiller v. Cotton*, 54 Miss. 551; *Adams v. Kyzer*, 61 Miss. 407. If this rule works a hardship upon the taxpaying landowner in such cases, the remedy lies with the legislature.

As to the third assignment of error, we see no merit in it whatever, as the act itself (section 1698, chapter 196, Acts of 1912) expressly provides that the commissioners may do exactly what they did do—make the

new assessment of the benefits to be derived by each separate tract of land and raise revenue therefrom according to the provisions of the law.

The decree of the lower court is correct, and is affirmed.

Affirmed.

BANK OF MORTON v. ETHRIDGE & HARDEE ET AL.

[72 South. 902.]

PARTNERSHIP. *Liability on note. Ratification.*

Where the managing partner of a partnership business had full authority to contract debts and borrow money to carry on such business, and did so with the knowledge of his copartner, and the money borrowed from plaintiff bank, was used to pay the debts of the partnership in the regular course of its business and inured to the personal benefit of the copartner in paying the necessary expenses and debts of the business which otherwise he would have had to ultimately pay and such copartner did not object or protest, but impliedly acquiesced therein, in such case the copartner ratified the loan and became liable on the note given therefor, though he had previously notified the plaintiff bank not to loan money to the partnership.

APPEAL from the chancery court of Scott county.

HON. G. C. TANN, Chancellor.

Suit by the bank of Morton against Ethridge & Hardee and others. From a decree for defendants, dismissing the bill as to defendant Hardee and others, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Howie & Howie, for appellant.

We are unable to find any thing in point against us in the cases cited by the counsel in their brief. Most of them are wholly different in the facts and in no wise applicable.

The case of *Langan v. Hewett*, is a case where there was a partnership agreement which bound the partners as to what they could and could not do. In the present case there was no partnership agreement at all. They were running as general partners without any limitations on the powers of either. The only time that there was any attempt to limit the powers of either was when the appellee wrote the Bank regarding one loan. Later the partner Ethridge states that it was agreed between him and Hardee that he, Ethridge, should come back to Morton and run the business and that he was to get a loan from the Bank of Morton if he could. No one has denied the correctness of this statement of Ethridge, not even Hardee himself. Then the facts are that there was no limitations on the power of Ethridge at the time of making of this loan. Ethridge told the bank that he had authority to borrow the money, he was in charge of the business with the knowledge and consent and on the direction of Hardee.

In the case of *Bloom v. Helm*, one partner signed accommodation paper. This was not within the scope of his authority nor in the course of the business of the firm. In the present case, even counsel for the appellee do not contend that this money was not loaned in the usual course of the business and that it had not been done before and was proper in the handling of the business. Here it was customary for the thing to be done and was within the scope of the partner's authority, there it was not. Quite a different case.

The case of *Price v. Crawford*, is also different. The trouble there was that the debt was contracted without the scope of business. Here it was not only within the

scope of the business but had been done many times before. Further, by the uncontradicted testimony of Ethridge, it was procured on the suggestion of Hardee to Ethridge.

The case of *Stegall v. Coney* turned on the point of fraud on the part of the partner in the making of the debt. Here there is not the least taint, or suggestion of taint, of fraud.

In the case of *David v. Richardson*, the court repeatedly stated that: "If the money was not necessary in the business" then the firm would not be liable and it not being found necessary in that business under consideration it was held that the partnership was not bound. In the case now before the court everybody acknowledged, and no one will now contend, but that the money borrowed from the bank was necessary to the business and was actually used in the partnership business for the payment of debts that the defendant, Hardee, would have otherwise had to pay.

In the last named case there it also the modification that such is the law unless he "subsequently ratified the transaction." In the present case we are insisting that regardless of all other contentions we are entitled to stand on the proposition of ratification by Hardee.

In the case of *King v. Levy*, one member of the firm attempted to bind the firm for the payment of his individual debt. This was properly held to be without the scope of his authority. Then, too, there was a contract or articles of agreement which forbade such. Here the money was for the firm and used by the firm and there was no partnership agreement affecting the transaction. The quotation from Judge Campbell's opinion cited recites that there were articles of the partnership agreement which forbade the making of the firm liable for the partner's individual debt; so none of this is in point.

We do not want to be tedious, or appear to cite cases endlessly, in our briefs in this case. But for fear

that we shall let our perfect confidence in the correctness of our contentions lead us away from citing some law that would be helpful, we are going to cite further authorities to sustain our argument as set out in our first brief. 5 Elliott on Contracts, pages 1073, 1074, 1075, 1087, 1088, 1102; *Buetner v. Steinbrecker*, 91 Iowa, 588; Rand, Commercial Paper, section 399; *Clark v. Hymann*, 55 Iowa, 14; *Levy v. Abramsohn*, 81 N. Y. Sup. 344; *Tate v. Clements*, 16 Fla. 339; *Drumwright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *American Ex. Bank v. Georgia Company*, 87 Ga. 656.

To hold that Hardee is not liable is to hold that he can accept the fruits of the loan and keep his money in his pocket, instead of returning that which was borrowed to pay his own debts. This is not equity.

J. D. Fatheree, for appellee.

None of the cases cited by appellant are in line with the case at bar. No one denies that any one partner can bind the partnership business, but that is not the case here. In the case at bar one of the partners, Hardee, gave the complainant written notice that he, Hardee, would not be responsible for any further advances or accommodations made to Ethridge, the other partner, for anything. The court will see from the testimony of Mr. Moore that the bank had made only one loan to Ethridge & Hardee before the loan in question. Hardee learned about this loan, while on a trip over to Forest and came back home and gave the complainant written instructions not to do so again expecting him to be responsible, the complainant acknowledged receipt of the instructions and promised to abide thereby and about eight months thereafter advanced Ethridge the loan, a part of which is in question, without any revocation of the instructions from Hardee, and now tries to hold him for the debt in the face of these facts, according to Ethridge, which is the only testimony on the point,

that at the time the note became due there was enough partnership property to satisfy the balance due on the note.

The supreme court says, in the case of *Langan et al., Executor, v. Hewett*, 13 S. & M. 122, quoting from Story on Partnership, page 194, note 2: "It is said one partner cannot, in violation of known stipulations in articles of partnership, bind the firm even for money which is applied in liquidation of debts of the firm." This case, more than any other cited by appellant, fits the case at bar. The other cases cited merely declare the well known rule that in the ordinary course of the partnership one partner can bind the firm but that rule does not fit the facts of the case at bar and therefore does not apply.

Green & Green, for appellee.

The liability of Hardee is predicated upon the proposition that one partner has power to bind another partner in the firm business, without his knowledge or consent; but this fails to give effect to the controlling legal proposition in the case, viz: that where there is a limitation on the power of one partner to bind the other in the business, and this is known to the party with whom the dealing is had, then the agency ceases and the partner is not bound individually.

None of the cases cited by appellant apply to this case for this reason. *Langan v. Hewett*, 13 S. & M. 123, 126, holds: "It is said that one partner cannot, in violation of unknown stipulations in the articles of partnership, bind the firm, even for money which is applied in liquidation of the debts of the firm. Story on partnership, 194, note 2."

In *Bloom v. Helm*, 53 Miss. 21, it was held: "Each member of a mercantile partnership may draw and accept bills of exchange in relation to and in furtherance of the partnership business, and although the partnership articles prohibit either member to draw or accept

bills, this in nowise affects the public, except as it has notice of it, for the mere formation and existence of the partnership is the communication of power to each member to transact the business of the firm, and bind each partner accordingly." Note that the agency is restricted where the party dealt with has notice of the limitation.

In *Price v. Crawford*, 50 Miss. 344, there was a planting corporation, which was in principle like that of operating a turpentine orchard, as in the case at bar.

In the case at bar, however, the chancellor has found, as a fact that the bank knew that Hardee had forbidden any loan to be made to the firm.

In *Stegall v. Coney*, 49 Miss. 761, 769, it was held: "The authority of a partner is limited to those things done in the regular course of the business of the firm; outside of this he has no authority, Parsons on Partnership, 163. If he sells the whole or a part of the assets, with the intent to apply the proceeds to his own use, and thereby defrauds his partners, if the purchaser from him has knowledge of such an intent, or the transaction was attended with such circumstances as would have imparted knowledge, but for his gross negligence, then the purchaser's title is affected and vitiated. Parsons on Partnership 164. If the attempt be to mortgage or assign, and that be done in an unusual way, or under suspicious circumstances, such an act would be of no effect, as against the parties injured thereby." *Davis v. Richardson*, 45 Miss. 499.

From the foregoing authorities it is clear that when Hardee notified the bank not to lend the firm any money, and the bank violated these instructions and allowed Ethridge to borrow money in the name of the firm, there was no liability upon Hardee therefor. It is contended, however, that Hardee is bound because the proceeds of the loan were used in partnership business.

King v. Levy, 13 So. 282 holds: "Where the articles of copartnership expressly deny the right of each part-

ner, without the consent of the other, to bind the firm for borrowed money, a contract in violation of such agreement would not be valid, though it was made in furtherance of the interests of the firm."

The chancellor has found on the facts, and on a conflict of the evidence that the bank was forbidden to make this loan, and the decree of the chancellor on this conflict in the evidence will not be disturbed by this court.

HOLDEN, J., delivered the opinion of the court.

It appears that R. T. Ethridge and J. L. Hardee operated a turpentine business near Morton, Miss., as a partnership under the firm name of Ethridge & Hardee. Mr. Hardee lived in another part of the state, and the business was managed by Mr. Ethridge, who transacted all the business of the concern, paying off the hands, making contracts for turpentine rights, borrowing money at different times with which to run the business and pay the hands, and selling the products and purchasing the crude materials to be used in the business. Ethridge executed a note for one thousand dollars in the name of the firm to the Bank of Morton, received the money and used it in the regular course of the business of the partnership, the money being used to pay the debts of the concern contracted for turpentine rights, labor, and other necessary expenses in connection with the operation of the plant. When the partnership became insolvent, Hardee, the only solvent member of the concern, took over the assets and disposed of them, and refused to pay the note here in question, claiming that he was not individually liable for the amount of the note because he did not authorize its execution, but, on the contrary, that he had previously notified the Bank of Morton that he would not be individually responsible for any loan that it might make to the firm of Ethridge & Hardee. The Bank of Morton

admitted having received this notice from Mr. Hardee several months before the loan was made, but the bank introduced proof, showing that Mr. Hardee subsequently authorized this loan of one thousand dollars to the firm by telephone and otherwise, which was denied by Mr. Hardee.

The chancellor found in favor of Mr. Hardee in the lower court on this disputed question of fact, which finding we do not disagree with. But we disagree with the chancellor in his holding, under all the facts in this case, that Mr. Hardee is not liable for the amount of the note. It appears conclusively from this record that Mr. Hardee instructed Ethridge to borrow money for use in the business; and, further, it is shown that Ethridge was managing and conducting the business and had full authority to contract debts and borrow money to carry it on, and that this was done with the knowledge of the appellee Hardee. The money that was obtained from the bank was used to pay the debts of the firm in the regular course of its business, and it inured to the personal benefit of Hardee in paying the necessary expenses and debts of the business which otherwise he would have had to ultimately pay. The money was thus used in carrying on the business of this concern with the knowledge and consent of Mr. Hardee, and he was, according to his own testimony, notified of the existence of this loan to the firm at the time the money was being used to pay the debts incurred in the usual course of the business, and he did not then object or protest, but impliedly acquiesced therein, with full knowledge of the use that the money was being put to and the benefit he was receiving therefrom. Therefore Mr. Hardee by his conduct impliedly ratified the loan and became responsible for it as a partner in the business. We think it would be contrary to equity and good conscience to hold that a partner may escape liability, even though he had several months prior notified a bank to not loan money to his partnership,

when such loan is made to the partnership by his instruction, in the usual course of the business, and where he knowingly received the benefit of the money by using it to carry on the business and pay the debts of the firm for which this member would otherwise be individually liable. Am. & Eng. Enc. Law, vol. 22, pp. 140, 161; Story on Partnership, p. 223, sec. 37, p. 44; 30 Cyc. 477, 478, 485-487, 489-504; *Cummings v. Parish*, 39 Miss. 412; *Langan v. Hewett*, 13 Smedes & M. 122; *Sylverstein v. Atkinson*, 45 Miss. 81; *Anderson v. Wanzer*, 5 How. 587, 35 Am. Dec. 170.

In view of these conclusions, the decree of the lower court, dismissing the bill as to Mr. Hardee, is reversed, and a decree entered here for appellant.

Reversed.

HOLMAN v. RICHARDSON.

[72 South. 921.]

1. WATERS AND WATER COURSES. *Surface waters. Right to deflect. Drainage. Prescription. Knowledge.*

The common-law rule which obtains in Mississippi, is that surface water is a common enemy which every proprietor may fight as he deems best, regardless of its effect upon other proprietors, and that accordingly the lower proprietor may take any measures necessary for the protection of his property, although the result is to throw the water back upon the land of an adjoining proprietor.

2. SAME.

Where surface water has been accustomed to gather and flow along a well-defined channel which by frequent running, it has worn into the soil, it may not be obstructed to the injury of the dominant proprietor and a lower proprietor must protect himself with due regard to the rights of the upper proprietor and so as not to injure him unnecessarily, and is liable for any injury due to his recklessness or negligence.

3. SURFACE WATER. Drainage. Prescription. Knowledge.

The right of drainage across the land of another is not gained by prescription though continued for twelve years, where such drainage was by tile drainage and was unknown to the owner of the lower land.

APPEAL from the chancery court on Noxubee county.
HON. J. F. MCCOOL, Chancellor.

Bill by Geo. Richardson against Mrs. M. E. Holman.
From a decree for complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

A. T. Dent and Meville, Stone & Currie, for appellant.

W. W. Magruder, for appellee.

POTTER, J. delivered the opinion of the court.

The appellee, George Richardson, was complainant in the court below, and the appellant, Mrs. M. E. Holman, was defendant there. Mr. Richardson and Mrs. Holman lived on adjoining lots in the city of Macon. Their lots are so situated that large quantities of surface water are gathered together during rains on Mr. Richardson's premises and flow over the lot of Mrs. Holman, to her annoyance, inconvenience, and detriment. To stop the flow of this surface water, Mrs. Holman had begun the erection of a brick and cement wall between her property and the property of Mr. Richardson along their entire property line. The result of the building of this wall as contemplated would have been to confine the surface water falling on Mr. Richardson's lot on his own premises, unless he provided another outlet for same. Twelve years prior to the time when Mrs. Holman began the building of the said wall, Mr. Richardson had constructed an underground tile drain across his lot and ending at the property line between himself and Mrs. Holman; and this tile drain emptied into a ditch running through Mrs. Holman's lot. This

tile drain gathered the surface water on the Richardson lot and projected it onto the lands of Mrs. Holman, and the same was carried off by the said ditch through Mrs. Holman's land. Mrs. Holman in beginning the erection of the said brick and cement wall had stopped up the tile drain at the point where it emptied in the ditch on her land, and thus turned the water flowing through same from the Richardson lot back on that lot. The tile drain in question was put down twelve years previous to the time when Mrs. Holman began to erect her wall and stop the flow of water through same. The right to continue to maintain an outlet through this tile drain and the ditch through Mrs. Holman's premises is claimed by the appellee by prescription. Mrs. Holman testified, however, that she did not know of the existence of such tile drain, except for two or three years, and no one testifies that she did know of the existence of such drain for the statutory period. Mrs. Holman's property has been greatly damaged by the flow of surface water from Mr. Richardson's lot, and if she is permitted to build the wall in question and stop the flow of water through the tile drain above mentioned, Mr. Richardson's property in turn will be greatly damaged. It appears, however, from the evidence that with the expenditure of a comparatively small amount of money, Mr. Richardson can drain his property by the way of drains constructed on his own land. On the prayer of Mr. Richardson an injunction was issued, restraining Mrs. Holman from erecting the wall she had started to build between the two properties, and upon final hearing the chancellor made the injunction perpetual. From this decree perpetuating the injunction, Mrs. Holman appeals to this court.

Two questions are presented for determination in this case: First, whether, because Mrs. Holman's lot is on lower land than Mr. Richardson's, she must keep it so unobstructed as to serve as an outlet for the surface water on the upper lot; second, has Mr. Richard-

son acquired an easement by prescription to drain his property through the ditch running through Mrs. Holman's property?

The first question to be determined depends upon whether the rights of adjoining owners in the flowage of water are to be ascertained and determined in this state by the common-law rule or the civil-law rule.

"The rule of the civil law, which has been adopted in a number of jurisdictions, is that as between owners of higher and lower ground, the upper proprietor has an easement to have surface water flow naturally from his land onto the land of the lower proprietor, which is subject to a corresponding servitude, and hence the lower proprietor has not the right to obstruct its flow and cast the water back upon the land above; but this applies only as to water arising from natural causes, as from the falling of rain or the melting of snow, and water arising from springs and draining off without a defined channel."

The rule of the common law "is that surface water is a common enemy which every proprietor may fight as he deems best, regardless of its effect upon other proprietors, and that accordingly the lower proprietor may take any measures necessary for the protection of his property, although the result is to throw the water back upon the land of an adjoining proprietor; although it has been held where surface water has been accustomed to gather and flow along a well-defined channel, which by frequent running it has worn into the soil, it may not be obstructed to the injury of the dominant proprietor, and that a lower proprietor must protect himself with due regard to the rights of the upper proprietor, and so as not to injure him unnecessarily, and is liable for any injury due to his recklessness or negligence." 40 Cyc. 640—643.

We have no hesitancy in declaring the common-law rule prevails in this state. In the case of *Alcorn v. Sadler*, 66 Miss. 229, 5 So. 695, Judge CAMPBELL, in

delivering the opinion of the court, gave recognition to the rule when he said:

"It matters not that the water comes from the surface of adjacent lands owned by Sadler. He may arrest its flow over his land and divert it before it gets to rest in the reservoir or lake, or whatever the body of water may be called," etc.

In the case of *Sinai v. Railroad Co.*, 71 Miss. 547, 14 So. 87, this court based its opinion on the common-law rule, and applied the common-law rule in that case, modifying it, however, to suit new conditions and a new situation, as the rules of the common law have ever been altered and modified to meet new conditions and to keep pace with the growth of the country and progress of civilization. In that case the court said:

"The question presented is resolvable by the application of common-law principles to new and changed conditions. At the ancient common law every land owner fought and fenced against surface water as suited his necessities. It was a common enemy, which the landholder dealt with according to his own pleasure, for his own protection. But this strict rule had its origin when the soil was used for agricultural purposes. In that primeval day of the law's birth and growth a railway corporation as a landowner was undreamed of. Now, with a network of railway lands spread all over the face of the country, we are called to deal with, in the application of legal principles, with a condition of affairs not thought of when every man fought surface water to suit his own fancy. Still, then, as now, the rule was that each must so use his own as not to do unnecessary harm to another. Each proprietor has the right to the use and possession of his own soil; each has equality of proprietary rights, and upon each is imposed, in organized society, regulated by law, resting on mutual concession, reciprocal duties and correlative obligations. No one, naturally or artificial, has the absolute dominion and unlimited control of his

own lands. Blending these harmonious rules of the common law, and adopting them in their flexibility to the new order of society, we shall do no violence to either while we apply both to the case in hand."

And upon this reasoning the court held that a railroad company, constructing its roadbed in a manner which will naturally result in injury to another by obstructing the flow of surface and overflow water, where another method equally safe, convenient, inexpensive, and not injurious is rejected, is liable for the consequent injury.

As to whether or not Mr. Richardson has acquired a title by prescription to drain his lot through the tile drain and ditch above mentioned, we are of the opinion that, even though such right as he claims may be acquired by prescription, the matter is not presented in this case; for there is no testimony to prove that Mrs. Holman had knowledge of the existence of this tile drain for the statutory period.

The injunction is therefore dissolved, and complainant's bill dismissed.

Dismissed.

STATE v. BRIDGFORTH.

[72 South. 922.]

BANKS AND BANKING. *Receiving deposit for insolvent bank. Prosecution. Indictment.*

This indictment for receiving deposits for an insolvent bank knowing or having good reason to believe it insolvent, as set out in the facts of this case, was held by the court sufficient under Code 1906, section 1169, as amended by Laws 1912, chapter 211, dealing with this offense.

APPEAL from the circuit court of Holmes county.

HON. F. E. EVERETT, Judge.

Louis Bridgforth was indicted for receiving deposits for an insolvent bank when he had good reason to believe the bank was insolvent. From an order

sustaining demurrers to the indictments, the state appeals.

The indictment charges that:

The defendant "on the 4th day of March A. D. 1913, being then and there, and for a long time prior thereto, cashier and agent for the Bank of Pickens, the said Louis Bridgforth being then and there cashier and agent thereof, the said Bank of Pickens being a corporation then and there situate and engaged in the banking business of receiving on deposit the money and other valuable things of other persons, and as such cashier and agent, as aforesaid, being then and there conducting the business of receiving on deposit the money and other valuable things of other persons for the said Bank of Pickens, the said bank being then and there wholly insolvent and the said Louis Bridgforth, as aforesaid, then and there having good reason to believe that the said bank was insolvent did then and there unlawfully and feloniously receive a deposit of money in the sum of forty dollars and fifty cents from one H. C. Tye, a depositor, the said money being then and there of the value of forty dollars and fifty cents in legal tender and current money of the United States of America, a further description of which said money was then and there to said grand jurors unknown, which said sum of money as aforesaid was then and there received for deposit in the said Bank of Pickens; and the said Louis Bridgforth, cashier and agent as aforesaid, did not then and there, or at any time prior thereto, inform the said H. C. Tye, a depositor as aforesaid, that the said Bank of Pickens was then and there insolvent, against the peace and dignity of the state of Mississippi."

Section 1169 of the Code of 1906 as amended by chapter 211, Laws 1912, which was in force at the time the crime is laid, provides that:

"If the president, manager, cashier, teller, assistant, clerk, or other employee or agent of any bank or

broker's office, or establishment conducting the business of receiving on deposit the money or other valuable things of other persons, shall remove or secrete or conceal the assets or effects of such establishment for the purpose of defrauding any of the creditors of the establishment, or shall receive any deposit knowing, or having good reason to believe, the establishment to be insolvent, without informing the depositor of such condition, on conviction he shall be imprisoned in the penitentiary not longer than five years."

Ross A. Collins, Attorney-General, for the state.

POTTER, J., delivered the opinion of the court.

Louis Bridgforth was indicted at the February, 1913, term of circuit court of Holmes county on a charge of receiving deposits for an insolvent bank when he had good reason to believe that the said bank was insolvent. The indictments in all the above-numbered cases are identical, except as to the name of the depositors from whom the deposits are alleged to have been received, and the amounts, and the decision of one of said cases is therefore controlling in the others.

The indictments were drawn under section 1169, Code of 1906. A demurrer was interposed to the indictments, alleging the following grounds, to wit: That no offense was charged; that there is no law making criminal the acts charged; and that the law under which said indictments were drawn has been repealed so that said indictments charge no crimes. No brief was filed by appellee in this case, although special requests have been made for same. There is no foundation for any one of the grounds of demurrer set up by the defendant in the lower court. The orders sustaining the demurrers are manifestly wrong; and, in view of the fact that no brief is filed by appellee, we are at a loss to understand upon what theory the learned circuit judge acted in sustaining the demurrer.

Reversed and remanded.

ROBINSON v. ROBINSON.

[72 South. 923.]

1. DIVORCE. *Alimony. Custody of children. Proceeding to modify decree. Payment of wife's counsel fees.*

The allowance of alimony is justified by the natural obligation of the husband as the bread winner of the family, to support his wife. If there is no legal marriage of the parties, there is no legal obligation on the husband for this support or for alimony.

2. DIVORCE. *Custody of children. Proceedings to modify decree. Payment of wife's counsel fees.*

Where a husband and wife have been divorced and the wife allowed alimony in a gross sum, the husband is not liable for the wife's counsel fees in a subsequent proceeding to modify the final decree in the divorce proceeding so as to award the custody of the children to the wife, since the parties were then legally strangers to each other and there being no statutory authority for such an allowance.

APPEAL from the chancery court of Lauderdale county.
HON. SAM WHITMAN, JR., Chancellor.

Suit by Dr. B. L. Robinson against Mrs. M. A. Robinson. From an interlocutory decree allowing Mrs. Robinson for counsel fees, Dr. Robinson appeals.

This is an appeal from an interlocutory decree of the chancellor requiring appellant to pay appellee one hundred dollars solicitor's fee. It appears from the record that Mrs. M. A. Robinson, appellee herein, sued her husband, the appellant, for a divorce in the year 1910, and the prayer of her bill was upon due hearing granted. Just before the decree of divorce was granted the parties entered into a written agreement as to the amount of alimony, both temporary and permanent, and this agreement was by the court approved, and the terms thereof were incorporated into the final decree. By this decree appellee was awarded alimony in a gross sum, to wit, four thousand two hundred and fifty dollars payable however, in certain installments. In addition to the gross sum awarded appellee, the decree further provided that appellee should have the custody of her two minor children, and that appellant should pay certain stipulated sums for

the maintenance and support of the children. The court expressly reserved the right to alter or change the decree as to the care and custody of the children. In 1914 appellant filed petition in the same court seeking a modification of the decree in reference to the custody of the children, representing that the children were of such age that they demanded a public school education, and such degree of maturity that appellant could have them cared for by a matron, and could provide for them in his own home much cheaper and better than could be done under the conditions which then obtained. The appellee answered this petition, denying the material portions thereof, and in answering she presented a written application or motion asking the court to award her a reasonable sum as solicitor's fee with which to contest appellant's petition for the custody of the children. In her motion the fact is disclosed that she still has one thousand eight hundred dollars of the four thousand two hundred and fifty dollars alimony originally awarded her. The court allowed an attorney's fee of one hundred dollars, and to the rendition of this decree appellant objected, and prayed for and obtained an appeal to settle the principles of the case.

B. M. Deavours, Stone Deavours and D. B. Cooley,
for appellant.

STEVENS, J., delivered the opinion of the court.

The allowance of alimony is justified by the natural obligation of the husband, as the bread winner of the family, to support his wife. If there is no legal marriage of the parties, there is no legal obligation on the husband for this support. *Reed v. Reed* 85 Miss. 126, 37 So. 642. The parties hereto were divorced in the year 1910, and are now in the eyes of the law strangers one to the other. The petition which appellant filed in the court below, and which prompted the allowance of the attorney's fee complained of, was

not a petition for a divorce, but one purely and simply for the custody of the children. It was the same issue that is frequently presented by *habeas corpus*. At the time it was presented, appellant had been freed of the primary moral and legal obligation to contribute to his wife's support and, without a statute justifying it, the court had no authority to award solicitor's fees in this case, and his action in so doing constituted error. Not only was there an absence of those obligations imposed by the marriage ties, but appellee in her very motion shows that she has a separate estate derived from the husband as a part of the gross sum awarded as permanent alimony. Our court has expressly held that this constitutes "a settlement between the husband and the wife as to the extent of the husband's duty to contribute to her maintenance and support," and that the decree awarding a lump sum as permanent alimony "is final after the term at which it is rendered." *Guess v. Smith*, 100 Miss. 457, 56 So. 166, Ann. Cas. 1914A, 300.

It may be that the circumstances of this case suggested to the learned chancellor that appellant should be chivalrous enough to employ counsel for both parties; that in again entering the open door of the court, he should be considerate enough of his former wife to pay the admission fee of both and in doing so to adopt the "pay-as-you-enter system." We ourselves would promptly yield to this suggestion if there was any legal basis at all for it. But just why appellee should have thought of such a demand is a matter of speculation, unless her memory of former days and the marriage obligations that once existed gives a touch of reality to the familiar couplet:

"You may break, you may shatter the vase if
you will,
But the scent of the roses will hang round it
still."

Reversed and remanded.

JOHNSON, STATE REVENUE AGENT, v. REEVES & Co.

[72 South. 925.]

1. CONSTITUTIONAL LAW. *Favoring constitutionality. Legislative power. State revenue agent. Vested rights. Obligation of contract's office. Contract. Statutes. General and special. Taxation. Exemptions. Construction. General rules. Dismissal and non-suit. Grounds. Abatement of statute.*

The power to legislate is vested in the legislature and before the court can strike down an act of the legislature as unconstitutional it must put its hands upon the exact provision of the Constitution which denies to the legislature their power to pass the act, and not only to point out the provision or provisions that are violated, but to hold beyond a reasonable doubt that the act conflicts with such provision of our organic law.

2. CONSTITUTIONAL LAW. *Legislative power. State revenue agent.*
The office of state revenue agent is a legislative and not a constitutional office. The legislature has the unquestioned right at any time to prescribe the duties of this officer or to curtail his power or it may abolish the office altogether.

3. SAME.

An office is not a contract, and the incumbent has no vested interest in the term, fees, or emoluments thereof.

4. STATUTES. *General and special acts. Taxation.*

Acts 1916, chapter 231, amending Code 1906, section 4750, providing that all authority of the state revenue agent to prosecute suits or appeals to assess for taxation an agricultural product are revoked and annulled and that appeals shall abate and be dismissed, is a general law and not in violation of Constitution 1890, section 87, prohibiting special and local laws.

5. SAME.

Such statute does not exempt property from taxation, levy or sale nor is it intended to create, increase or decrease the fees, salary, or emoluments of any public officer, and is therefore not violative of any of the provisions of section 90 of the Constitution of 1890.

6. SAME.

Such statute does not violate section 100 of the Constitution since it does not remit, release, postpone or diminish the fixed liability or obligation of any taxpayer. It does not undertake to declare that those who owe past due taxes on agricultural products are or shall be freed from such liability.

7. STATUTES. *Construction. General rules.*

In construing an act the court must look to the act as a whole and not hang upon a single word therein.

8. DISMISSAL AND NONSUIT. *Grounds. Abatement by statute.*

Where by statute certain actions are abated and power to maintain them is taken away, the trial court is without jurisdiction to further proceed and must dismiss such actions.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

Suit by J. C. Johnson, State Revenue Agent, against Reeves & Company. From a judgment of the circuit court dismissing plaintiff's appeal from the decision of the board of supervisors and abating the suit, plaintiff appeals.

In May, 1915, appellant, as state revenue agent, caused George P. Reeves & Co., cotton buyers of Vicksburg, Miss., and appellees herein, to be back-assessed on a large number of bales of cotton for the years 1909 to 1914, both inclusive, in accordance with the provisions of section 4740, Code of 1906. Written objections were filed against said assessment by appellees, and upon hearing by and before the board of supervisors of Warren county the board "disallowed and discharged" the assessment thus attempted to be made by the revenue agent, and from this order of the board appellant prosecuted an appeal to the circuit court of Warren county. While this appeal was pending in the circuit court, and on March 21, 1916, the Legislature of the state of Mississippi passed an act, being Senate Bill No. 310, amending section 4750 of the Code, providing that the revenue agent at the expiration of his term of office should deliver the documents of his office to his successor and requiring the successor to allow all suits theretofore commenced to be conducted in the successor's name. Senate Bill No. 310 read as follows: "An act to amend section 4750 of the Code of 1906, providing for the delivery by the state revenue agent of documents to his successor, and the

abatement and prosecution of assessments, suits and appeals instituted by him.

"Section 1. Be it enacted by the legislature of the State of Mississippi, that section 4750 of the Mississippi Code of 1906 be amended to read as follows:

"'4750 (4201). *Deliver Documents to His Successor.*—The state revenue agent, at the expiration of his term in office, shall deliver to his successor all books, papers and documents pertaining to the office. The successor shall allow all suits commenced, except suits or proceedings for collection or assessments of taxes on agricultural products, to be conducted in his name; but the person who commenced the suit shall pay all attorney's fees and expenses thereof, and receive the commissions, if any.

"'But all power and authority of the state revenue agent and his predecessors in office, to institute or prosecute any suit, appeal or proceeding to assess for taxation, or to collect taxes on agricultural products from or against the owners thereof, are hereby revoked and annulled, and all assessments for back taxes on agricultural products and all suits, appeals and proceedings of every kind to assess for back taxes or to collect back taxes on agricultural products heretofore begun or instituted or now pending shall abate from and after this date, and shall be dismissed.'

"Sec. 2. That this act be in effect and force from and after its passage.

"Approved March 21, 1916."

Thereafter, on April 24, 1916, during the regular term of the circuit court, appellant's appeal from the order of the board of supervisors was, by the court on its own motion and in pursuance of said act, dismissed. From the judgment of the circuit court dismissing the appeal and abating the suit appellant prosecutes this appeal, and thereby presents for the decision of this court the constitutionality of said Senate Bill No. 310.

Tim E. Cooper and A. H. Longino, for appellant.

Catchings & Catchings, McLaurin & Arminstead, Brunini Hirsch & Griffeth Hirsch, Denton Landau, Watkins & Watkins and Gwin & Mounger, for appellees.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). Counsel leading the attack upon the constitutionality of Senate Bill No. 310 direct our attention to and rely upon the following sections of our Constitution, which they contend, are violated by the act in question, viz.: Sections 112, 87, 90 (h and o), 66, and 100. In presenting the case, they argue these several sections of the Constitution more collectively than separately, frankly conceding, however, "that it devolves upon the appellant here to put his hands upon the provisions of the Constitution which prohibit the exercise by the legislature of the power to pass the statute."

It must equally be conceded that in our form of government the power to legislate is vested in the legislature, and that, before the court can strike down the act in question as unconstitutional, we must put our hands upon the exact provision of the Constitution which denies to the legislature the power here exercised, and not only to point out the provision or provisions that are violated, but to hold beyond a reasonable doubt that the act in question conflicts with such provisions of our organic law. It is an elementary principle frequently announced by our court that the members of the legislature are the immediate representatives of the people, and that the expression of the legislative will by statute must be regarded as the expression of the will of the people in their sovereign capacity; and before the courts can interfere the will of the people as expressed in their law must necessarily conflict with their will as heretofore expressed in their Constitution.

If there is any doubt about the constitutionality of the act in question, such doubt must be resolved in favor of the law. Our court has likewise frequently called attention to the fact that it has nothing to do with the wisdom or expediency of a statute. What, then, is the purpose and effect of the amendatory act in question? After full consideration of the oral arguments and the able briefs on file, we are forced to conclude that the statute here attacked violates neither the spirit nor the letter of any of the provisions of the Constitution relied upon.

In construing the act we are justified in looking to and considering its title. It amends the Code section providing for the delivery by the outgoing revenue agent of all documents that will be of service to his successor, requires the successor to allow all suits commenced by the outgoing officer to be conducted in the name of the successor, "except suits or proceedings for the collection or assessment of taxes on agricultural products," and expressly abates such assessments, suits, and appeals as the revenue agent has instituted against or in reference to agricultural products. The act deals with the power and authority of the revenue agent as a fiscal officer of the state. It does not abate, and does not undertake to abate, any fixed liability of any person, firm or corporation for past-due taxes. The office of state revenue agent is a legislative and not a constitutional office. The legislature has the unquestioned right at any time to prescribe the duties of this officer or to curtail his power. Indeed, it may abolish the office altogether. It may here be stated also that an office is not a contract, and that the incumbent has no vested interest in the term, fees, or emoluments thereof. We are not called upon to search for the motives that may have inspired the amendment to section 4750 of the Code. It is sufficient to say that the legislature in its wisdom, and presumably after maturest deliberation, deemed it wise to trim the power

of this officer a bit and to deny altogether the right of the successor to allow his name to be used in the prosecution of any proceedings for the assessment or collection of taxes on agricultural products. Were we, however, called upon to search for a reason, we might be justified, we think, in saying that the power of an out-going officer to prosecute such proceedings armed this official with unusual power; that in the exercise of this power the revenue agent had frequently instituted blanket assessments against millions of dollars worth of property, taxes upon which were being claimed for many years past, and covering transactions about which records might be destroyed and memory failing. They may have concluded that the exercise of this power would lead to unauthorized and unjust assessments upon agricultural products, and especially upon such a product as cotton, which may or may not reach the mills the same year it is produced, the ownership of which so frequently changes from producer to merchant, from merchant to cotton buyer or banks, and from these in turn to the larger holders and manufacturers. Be this as it may, we cannot impute to the legislature either a desire or design to extend any exemption to one justly indebted to the state for past-due revenues, and there is here no attempt to pass a special or local law for the benefit of any individual or corporation. So far, therefore, as section 87 of the Constitution is concerned, this is a general law. There is no merit also in the contention that the statute exempts property from taxation, levy, or sale, or is intended to create, increase, or decrease the fees, salary, or emoluments of any public officer, and therefore it does not violate any of the provisions of section 90.

The only serious question presented by this appeal is whether the statute violates section 100 of the Constitution. If the necessary effect of the statute was to remit, release, postpone, or diminish the fixed liability or obligation of any taxpayer, then the statute would

violate this section of our fundamental law. As we interpret the statute, however, the amendment does not undertake or purport to remit, release, postpone, or diminish the obligation or liability of any person. It does not undertake to declare that those who owe past-due taxes upon agricultural products are or shall ever be freed from such liability. In construing the act we must look to the act as a whole, and not hang upon a single word therein. The essential part about the amendment is the provision that "all power and authority of the state revenue agent and his predecessor in office" to prosecute the appeal here presented is revoked and annulled, and the assessment on the cotton in this case, having been instituted not by the assessor or the sheriff but by the revenue agent himself, stands abated. In standing abated the liability, if any, has never become fixed. The act itself is not susceptible to the construction which counsel for appellant attempt to place upon it. It does not purport to deal with those assessments which under our revenue system or by operation of law have become fixed liabilities against any of the taxpayers of our state. The statute simply declares that the revenue agent shall no longer have the power himself to institute back assessments on agricultural products in Mississippi. It was not incumbent upon the legislature in the first instance ever to have reposed this power in him. Having once reposed the power, the legislature, expressing the state's will, now has the undoubted right to revoke it. The revocation of this power is the only complaint which appellant is in position to question. The act as amended having revoked his power to prosecute this kind of an appeal before the circuit court of Warren county, and having abated the very assessment which he as revenue agent had instituted, the circuit court was left without jurisdiction to render a final judgment, and the action was therefore properly dismissed. The judgment of the circuit court abating the assessment and dismissing

the proceeding of course neither imposes nor discharges any liability, and does not and will not stand in the way of the assessor in any attempt by him to back-assess appellees upon any agricultural products that might have escaped taxation and upon which appellee should pay taxes. The authorities fully sustain the right of the legislature to direct or authorize a reassessment or to validate an erroneous assessment, but no such question is even presented in this case. The cases cited by counsel for appellees fully sustain the views here expressed, and especially the following: *Colbert v. State*, 86 Miss. 769, 39 So. 65; *O. C. French et al. v. State*, 53 Miss. 651; *Kendall v. City of Canton*, 53 Miss. 526; *Hyde v. State*, 52 Miss. 665; *Bradstreet Company v. Jackson*, 81 Miss. 236, 32 So. 999; *State v. Order of Elks*, 69 Miss. 895, 13 So. 255; *State v. Hill*, 70 Miss. 106, 11 So. 789; *Crow v. Cartledge*, 99 Miss. 281, 54 So. 947, Ann. Cas. 1913E, 470.

Affirmed.

Cook, P. J. (dissenting). I am convinced, beyond all reasonable doubt, that the legislature intended by Senate Bill No. 310 to release the state's claim for taxes due by appellee and all others similarly situated. The title of the act throws a flood of light upon the purpose of the act.

It was certainly the duty of appellee to list his property for taxation, and it was certainly the duty of the assessor to assess the property so listed and to make the assessment whether it was listed or not, and it was the duty of the collector to collect the taxes so assessed. If it was the duty or obligation of appellee to list his property for taxation, he was liable for the taxes thereon, and the state was the owner of the obligation, or liability.

The legislature knew what it wanted, but, confronted with section 100 of the Constitution, it became necessary, if possible, to so frame the expression of its pur-

pose as to satisfy this constitutional limitation of its powers.

The necessary effect of the statute is to remit and cancel the claim of the state for the taxes due the state; it effectually relieves the taxpayer from all liability to the state. This is so clear to me that I am unable to see how any other conclusion can be reached. It may be good policy to abate liabilities of this kind and to exempt agricultural products from taxation, but, when this is done in total disregard of the Constitution, I cannot give my assent without violating my oath of office, as I understand it.

Again, it is my opinion that the act in question violates section 112 of the Constitution. Taxation and the collection of unpaid and unassessed taxes must be by uniform rules. To exempt one class of delinquents from the rule which empowers the revenue agent to proceed against delinquents simply destroys the uniformity of the rule. This act favors one class of delinquents and forbids the revenue agent from instituting proceedings against the favored class, but leaves the revenue agent free to proceed against all other delinquents. All taxpayers, except the statutory elect, must submit to the activities of the revenue agent.

It may be within the power of the legislature to exempt from taxation all agricultural products grown in the state, but when the legislature in express terms changes one of the uniform rules provided by general law for the taxation of property by exempting therefrom the owners of a certain class of taxable property, there can be no reasonable doubt that section 112 was ignored. So we have the desired result accomplished by indirection when it could not be accomplished directly.

The taxes were due and unpaid and were a liability owned by the state. The revenue agent had instituted proceedings to collect this liability, when the legislature steps in and abates these proceedings, and thereby takes from the state its own, and at the same time sets

up a new and different rule for the collection of the cotton tax. All other taxpayers may be assessed by the revenue agent for delinquent taxes, but by a special dispensation the favored taxpayer who has managed to escape from the regular assessing authorities is rewarded by forever exempting him from the possibility of being bothered by the revenue agent again.

I can imagine no more effective scheme to repeal the constitutional limitations upon the legislature than the one devised in this case and approved by the court.

EX PARTE BROWN.

[72 South. 924.]

CIRCUIT JUDGE. *Removal of stenographer. Term of office.*

Under chapter 135, Code 1906, providing for the appointment of court stenographers, the circuit judge cannot arbitrarily remove his stenographer, he being a public officer and holding for a term of four years.

APPEAL from the circuit court of Winston county.

HON. H. H. RODGERS, Judge.

Ex parte application by T. C. Brown for salary as official stenographer. The application was denied and applicant appeals.

The facts are fully stated in the opinion of the court.

T. C. Brown, pro se.

COOK, P. J., delivered the opinion of the court.

The appeal in this case involves the right of appellant to his official salary for one week's services per-

formed by him in the circuit of Winston county. The record discloses that the presiding judge held his first court in Winston county, and his first official act, after the court was organized, was to enter an order on the minutes of the court, removing appellant as official stenographer. This order recites that appellant "is not acceptable to the court by reason of his incompetency and neglect of duty, and for good and sufficient reasons." It appears that this order was made without notice, and without any charges having been preferred against the official stenographer. It appears that appellant offered to prove that he was competent, that he had never neglected his official duty, and asked to be heard before he was removed from office. The judge declined to hear anything, declined to allow the salary, and finally declined to sign the bill of exceptions tendered by appellant, which, however, was signed by members of the bar.

Appellant's title to the office is only incidentally involved in this appeal. If he was the official stenographer, the trial judge erred in refusing to allow his salary. The term of office of the stenographer is fixed by statute, his duties are prescribed by statute, and his salary and how it is to be paid is also fixed by law. The judge appoints the stenographer, but the judge does not fix his duties or his term of office—he is a public officer and remains such for four years, unless he is removed, dies, or resigns. We are not called on to indicate the procedure which must be followed to legally remove from office the official stenographer. We do hold that the order removing the stenographer in this case was *brutum fulmen*, and that the court erred when it refused to enter an order allowing his salary for one week. Chapter 135, Code of 1906, governs the appointment and removal of stenographers for circuit courts, and for the supreme court. Section 4798 provides that the stenographer of the supreme court may be removed at the pleasure of the

Brief for appellant.

[112 Miss.]

court, but we find nothing in the statutes authorizing the circuit judge to remove his stenographer at his pleasure. It clearly appears in this record that the judge thought he had the legal right to remove his stenographer at pleasure. He was wrong.

Reversed and remanded.

MISSISSIPPI CENTRAL RAILROAD COMPANY v. McWILLIAMS.

[72 South. 925.]

RAILROADS. *Injuries. Persons on track. Wood thrown by fireman.*

Where plaintiff was injured while walking on defendant's right of way by being struck by a stick of wood which was thrown off the tender by a fireman for his own use and which wood was being carried on the tender without defendant's knowledge or consent and for the fireman's private benefit, the defendant, railroad company, was not liable for damages so inflicted since the fireman was acting entirely outside of the scope of his employment.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Suit by Dave McWilliams against the Mississippi Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

S. E. Travis, for appellant.

We deem it unnecessary to deal with the assignments of error *seriatim* or to discuss all the points raised. The fourth, ninth, tenth, eleventh, and twelfth assignments deal with the motion for a peremptory instruction and the sufficiency of the evidence to support a verdict, and may be considered together. We submit

that the said motion for a peremptory instruction should have been sustained.

In the first place, the act complained of was not that of the appellant but that of the fireman in his individual capacity and for a purely personal object. The testimony shows without any contradiction and absolutely that appellee's injury resulted from the act of the fireman on the train in question while engaged in his own personal enterprise, throwing wood from the tender for his private use, without the knowledge or consent of the appellant, and the law is well settled that the master is not liable to a servant or any third party injured in such case. 6 Labatt's Master & Servant (2 Ed.), p. 6906; *P. & Ft. W. & C. R. R. Co. v. Mauw*, 21 Oh. St. 421; *Burke v. Shaw*, 59 Miss. 443; *I. C. R. R. Co. v. Latham*, 72 Miss. 32; *Sullivan v. Morris*, 109 Ill. App. 650; *Goodloe v. Memphis & C. R. R. Co.*, 107 Ala. 233; *R. R. Co. v. Douglass*, 69 Miss. 723; *Cotton Warehouse Co. v. Poll*, 78 Miss. 147; *Walton v. Sleeping Car Co.*, 2 N. E. 101.

The following authorities are to the same effect: "And a servant, though in charge of a dangerous agency, who acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purposes of his own, does not render his master responsible either for his wrongful act or omission. *Stephenson v. Southern P. Co.*, 93 Cal. 558, 15 L. R. A. 475, 27 Am. St. Rep. 223, 29 Pac. 234; *Chicago B. & Q. R. Co. v. Epperson*, 26 Ill. App. 79;" 10 L. R. A. (N. S.) note, page 396.

Where drills were carried on train by the baggage man merely to accommodate persons who had no contract relations with the carrier, the carrier receiving no benefit from the transportation and not knowing of or consenting thereto, and the baggageman threw such drills from the train and struck and injured the per-

son to whom they were sent, there was no liability. *Walker v. R. R. Co.*, 42 Am. St. Rep. 547.

Currie & Currie, for appellee.

The appellant assumes that the act complained of was that of the servant, wholly disconnected with the discharge of performance of the master's business. The evidence in this case establishes an entirely different contention. The fireman was in the performance of his duties, and was on duty in the actual discharge of his master's business at the time of the commission of the act producing the injury. Under these conditions, the act of the servant, whether within or without the scope of his employment, is the act of the master, or at least, establishes such a state of fact or condition at the time of the injury as to hold the master liable in damage. We will not attempt to criticize each case cited by appellant, but from a reading of these authorities, it is readily seen that not a single one of them is applicable to the case at bar. With reference to when the servant will be held to be acting within or without the scope of his employment under certain conditions, has been well discussed in the case of *Richburger v. American Express Company*, 73 Miss. 161, 18 So. 922; *Barmore v. V. S. & P. R. Co.*, 85 Miss. 426, 38 So. 210; *McManus v. Crickett*, 1 N. E. 106; *Railroad Company v. Young*, 21 Oh. St. 518.

There is another principle of law decided by the court in this opinion, which we insist is controlling in this case, that is with reference to the master entrusting to his servant machinery or appliances inherently dangerous within themselves. Upon this point the court said: "There is another theory developed by this record, which the appellant was entitled to have submitted to the consideration of the jury. It arose out of the well-established principle of law that the master who entrusts the custody and control of dangerous appliances

or agencies to the management of his servants will not be permitted to avoid responsibility for injuries inflicted thereby on the plea that the servant in the particular act complained of, was acting outside of the scope of his employment."

We especially direct the court's attention to this case, which we deem not necessary to quote from further. It is clearly established by this opinion that for the master to escape liability on the ground that the servant was acting beyond the scope of his employment is an exception to the rule. The true rule in such cases imputes liability to the master, and this rule arises from the absolute duty which is owing to the public by those who employ in their business dangerous agencies or appliances, engines or instruments liable, if negligently managed, to result in great damages to others.

By reference to the opinion, it will be seen that Judge WHITFIELD rendered the opinion in the case of *Canton Cotton Warehouse Company v. Pool*, and that the same Justice rendered a dissenting opinion in the case of *Barmore v. American Express Company*, above cited, citing in his dissenting opinion, *R. R. Co. v. Latham*, 72 Miss. 32, *Richburger v. V. S. & P. R. Co.*, 73 Miss. 161, and *Canton Cotton Warehouse Company v. Pool*. We call the court's attention to this dissenting opinion for this reason: that as contended by appellee these cases are not analogous to the case at bar, and the principles controlling these cases do not control the case at bar. Further, if the court should hold, as counsel for appellant contends, that this case is controlled by the same principles as are involved in the cases referred to in the dissenting opinion of Justice WHITFIELD, then we say: "These cases have been overruled by the opinion of the court in the *Richburger* case."

The evidence in the case shows conclusively that Knight, the fireman was in the discharge of his duties at the time he himself claims to have thrown the wood from the tender of the engine, and that the train was

running at a rate of eight or ten miles per hour. It has been repeatedly held by the courts of the country that a slight deviation from the master's duties by the servant will not relieve the master of responsibility.

The case of *Ritchie v. Waller*, 38 Am. St. Rep. 361, states the rule to be that in cases of deviation, the mere departure by the servant from the strict line or course of his duty, even for a purpose of his own, does not in and of itself constitute such a departure from the master's business as to relieve him of responsibility.

This was a case in which the servant, who was driving the wagon for his master, deviated from the route prescribed by his master, and left the team standing on the street, and went into a shop to have his shoes repaired, a purpose of his own, and while there the team of horses ran away, the wagon coming in contact with another wagon, producing the injury. The court held that the master was liable. The court said in the course of its opinion: "If the servant in going *extra viam*, is really engaged in the execution of the master's business, within the scope of his employment, it is immaterial that he join with it some private business of his own." We call the court's especial attention to this decision and the cases referred to. The court cited *Sleath v. Wilson*, 9 Car. & P. 607, wherein the master was held liable for the negligent act of his servant, who, after having set his master down, drove around to deliver a parcel of his own, and did not drive directly where he had been ordered to go, and other cases cited in this opinion.

In the case of *T. P. R. R. Company v. Scoville*, 27 L. R. A. 179, the engineer and fireman in charge of the railroad locomotive were held to be acting within the scope of their employment in blowing the whistle wantonly and mischievously to frighten the horse which a person is driving near the track, so as to render the company liable for the injury of the driver. This is

a well considered case and we submit establishes conclusively the liability of the defendant in the case at bar, since the jury returned a verdict against it.

In rendering the opinion the court quotes from the case of *Philadelphia & R. R. Co. v. Derby*, 55 U. S. —, 14 How. 468, 14 L. Ed. 502, wherein the court said: "Although among a number of cases of this subject-matter, some may be found in which the courts have made some nice distinctions, which are rather subtle and astute as to when the servant may be said to be acting in the employ of the master, yet we find no case which asserts the doctrine that the master is not liable for the acts of the servant in his employment, when the particular act causing the injury, was done in disregard of the general orders or special command of the master. Such qualifications of the maxim '*respondeat superior*,' would, in a measure, nullify it. A large portion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline and the most exact and perfect obedience to every rule and order emanating from the superior can insure safety to life and limb and property. Entrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders, is itself an act of negligence—the *causa causans* of the mischief—while the proximate causes or the *ipsa negligentia* which produce it may truly be said, in most cases to be a disobedience of orders by the servant so entrusted. If such disobedience of orders can be set up by the railroad company as a defense when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and dangers to life and limb of the traveler greatly enhanced." Further on in its opinion the court said: "It is contended that in this act the servants were not in the master's service, because not employed to blow the whistle wantonly and mischievously, to frighten

travelers or their horses; that contention is fully answered by the supreme court of Illinois; that these servants are not employed to do any negligent or unlawful act, and such a test would exempt the company from liability for all affirmative acts of these servants, violating the rights of others." We cite upon the same proposition: 14 Am. Rep. 114; also, 24 Am. Rep. 296.

POTTER, J., delivered the opinion of the court.

The appellee in this case, plaintiff in the court below, recovered a judgment for two hundred and fifty dollars against the appellant, defendant in the court below, on account of personal injuries sustained by him. The plaintiff in this case alleged and proved that he was walking on a path used a number of years by the general public as a footpath across the railroad right of way of the defendant company, and that when he reached a point on the railroad where the said path crosses same a worktrain of the appellant was returning to the city of Hattiesburg, and the fireman on said train, for his own private use, and without the knowledge or consent of appellant or any of its agents, threw some wood from the tender of the engine in question opposite his home, and, without seeing or knowing where the appellee was, struck him with the wood and injured him. It appears without contradiction in this record that the fireman was engaged in an enterprise of his own when he was hauling the wood on the tender of the engine. He had done this only two or three times previous to this occasion, and the conductor of the train did not know that the fireman was hauling wood on the tender of the engine, and, further, that this act on the part of the fireman was in violation of the rules of the railroad company, and the fireman was ordered to stop this practice, if such it had become, as soon as the conductor found out about it, at the time the accident occurred.

112 Miss.]

Brief for appellant.

This case must be reversed. The fireman on defendant's engine was acting entirely outside of the scope of his employment. The enterprise he was engaged in was his own. He was hauling wood for his own use, without the knowledge or consent of defendant's agents. *Burke v. Shaw*, 59 Miss. 443, 42 Am. Rep. 370; *Railroad Co. v. Latham*, 72 Miss. 32, 16 So. 757; *Railroad Co. v. Douglass*, 69 Miss. 723, 11 So. 933, 30 Am. St. Rep. 582; *Cotton Warehouse Co. v. Pool*, 78 Miss. 147, 28 So. 823, 84 Am. St. Rep. 620.

Reversed and judgment here for appellant.

KELLY v. STATE.

[72 South. 928.]

CRIMINAL LAW. Instructions. Reasonable doubt.

An instruction for the state that "by a reasonable doubt is meant not a mere speculative doubt or vague conjecture, mere supposition, or hypothesis, but such a doubt as reasonably arises out of the testimony, a doubt for which a reason can be given," besides being generally objectionable in attempting to define a reasonable doubt, is erroneous in declaring that a reasonable doubt must arise out of the evidence when it may arise also from the want of evidence.

APPEAL from the circuit court of Clarke county.

HON. R. W. HEIDELBURG, Judge.

Hub Kelly was convicted of forgery and appeals.

The facts are fully stated in the opinion of the court.

S. W. Johnston, for appellant.

Argument on assignment of error number three. Because the court granted the following instruction for the state, which instruction appears on page 70 of the record: "The court instructs the jury for the

state that by a reasonable doubt is meant not a mere speculative doubt or vague conjecture, mere supposition or hypothesis, but such a doubt as reasonably arises out of the testimony, a doubt for which a reason can be given."

The court can see at a glance that the learned judge below committed fatal error in granting this instruction. The instruction excludes the theory that a reasonable doubt may arise from the lack of evidence. This instruction has been condemned in the case of *Hale v. State*, in which the court observes: "An instruction as to reasonable doubt, which declares that it must arise out of the evidence, is objectionable, since it may arise from the want of evidence, *Hale v. State*, 72 Miss. 140; again in *Knight v. State*, 74 Miss. 140, Judge WHITFIELD said: A reasonable doubt may arise from the want of evidence as to some fact having a natural connection with the case. In *Taylor v. State*, Judge CALHOUN condemns almost the identical instruction. 89 Miss. 671. The district attorney has been flirting with the indefinable; trying to grasp that which is intangible, and if I be not mistaken, has committed a reversible error in securing the above instruction. The instruction was not cured by any additional ones; there were only a few instructions, and none for the state or for the defendant can be said to have cured the error. For this error, I am of the opinion that the case should be reversed.

Ross A. Collins, Attorney-General, for the state.

The third assignment is predicated on the instruction given the state, as found on page 49, and which is as follows: "The court instructs the jury for the state that by a reasonable doubt is meant not a mere speculative doubt or vague conjecture, mere supposition or hypothesis, but such a doubt as reasonably arises out of the testimony—a doubt for which a reason can be given."

I will not contend that this instruction was an absolutely proper one because it has come under the criticism of this court heretofore. In *Klyce v. State*, 78 Miss. 450, 28 So. 827, this court has criticised an instruction whereby the jurors are told that they should be able to state a reason for their reasonable doubt. However, as in the case last cited the giving of this instruction constituted no serious or reversible error. This instruction is attacked more for the reason that it fails to state that the doubt should arise both out of the testimony and from the lack of testimony.

Now it is apparent from a consideration of the record in this case that the appellant could not have been prejudiced by this formal omission, but on the contrary his case would rather be strengthened. Let it be remembered that the state's theory was built on evidence largely circumstantial in its nature, and consequently there were gaps in the evidence that had to be supplied from inductive reasoning. If the jury were told that they had to confine themselves to the testimony rather than the lack of testimony, the appellant was benefited rather than prejudiced. His defense was that of an *alibi* whereas the state, aside from the testimony of Mr. Foster, had to depend upon various concomitant circumstances to establish the guilt of the accused.

POTTER, J., delivered the opinion of the court.

The appellant in this case was indicted, tried, and convicted at the March term, 1916, of the circuit court of Clarke county on a charge of forgery, and was sentenced to serve four years in the penitentiary. In the trial of this case the court granted the following instruction for the state:

"The court instructs the jury for the state that by a reasonable doubt is meant not a mere speculative doubt or vague conjecture, mere supposition, or

hypothesis, but such a doubt as reasonably arises out of the testimony; a doubt for which a reason can be given."

This instruction is practically the same instruction as has been many times held erroneous by this court. Besides, being generally objectionable in attempting to define a reasonable doubt, the instruction is erroneous in declaring that a reasonable doubt must arise out of the evidence when it may arise also from the want of evidence. *Hale v. State*, 72 Miss. 140, 16 So. 387; *Knight v. State*, 74 Miss. 140, 20 So. 860.

Reversed and remanded.

SMITH v. STATE.

[72 South. 929.]

CRIMINAL LAW. *Variance. Objection. Waiver.*

Where an indictment charged defendant with stealing a cow belonging to several parties, but the evidence showed that it belonged to only one of them who died after it was stolen but before the indictment, leaving the other named owners as his heirs at law, the defendant in order to take advantage of the variance between the allegations and the proof should have objected specifically on that ground, whereupon under Code 1906, section 1508, the indictment could have been amended to correspond with the proof, and defendant failing to do this could not avail himself of such variance on appeal.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIAN, Judge.

Alex Smith was convicted of grand larceny and appeals.

The facts are sufficiently stated in the opinion of the court.

W. E. Mollison, for appellant.

There was a fatal variance between the allegation of ownership laid in the indictment and the evidence adduced on the trial.

The indictment charges that "a certain cow, the property of Ethel Young, Mathew Young, John Young and Perry Young, was feloniously taken." The proof shows unmistakably that the cow was the property of Berry Young the father, who was killed long after the cow was taken, and who had discovered its whereabouts in his lifetime. The state showed by John Young, one of the owners laid in the indictment (page 23 of the record) that he, Ethel, Mathew, and Perry, Jr., had inherited this cow from Perry, Sr. The evidence shows that if taken at all feloniously, the crime was complete during the lifetime of Perry, Sr., and as no one can be heir to the living there was no title in the four persons named in the indictment. No citation of authorities is required to show this learned court that the conviction in this case was improper and ought to be reversed. The court will pardon the pleader for naming a few of the cases which establish the doctrine beyond question, that in the question of ownership the *allegata* and *probata* must agree or conviction will not be sustained.

We quote from 25 Cyc. page 888: In an indictment for larceny the ownership of the property must be alleged." *Turner v. State*, 124 Ala. 59; *People v. Piggot*, 126 Cal. 509; *Buffington v. State*, 124 Ga. 24; *State v. Ellis*, 119 Mo. 437; and others. The same authorities, 25 Cyc. page 89.

"The allegation of ownership is material and must be proved as alleged in order to secure conviction." *McBride v. Commonwealth*, 13 Bush, Ky. 337; *Commonwealth v. Williams*, 1 Va. Cas. 14, and the citations following from the English and Canadian courts.

In the American Criminal Reports the court held in volume 13, page 712, 35 So. 65: "that where the indictment charged an assault upon Rosa Lee Nelson and the evidence showed that the person was Rosa Lee Ann, the court held that the conviction must be reversed."

We admit that it was entirely proper for the state to have requested permission to amend this indictment during the trial, but it did not elect to do so and so we have a conviction which upon its face is wholly improper, and the court might properly have set the conviction aside on its own motion. In a recent case in this court decided at this very sitting, *Griffin v. The State*, the court held that it is the duty of the trial judge to protect the interest of a defendant. (Advance sheet So. Rep.)

Ross A. Collins, Attorney-General, for the state.

Since the appellant himself admits taking the cow, under certain circumstances, there remains only to consider the alleged error contained in the variance between the proof and the indictment in regard to the ownership of the cow. At the time she was stolen it is admitted that she was the property of Perry Young, but when the indictment was found, Perry Young was dead, having met death in the manner above related, and consequently it devolved upon the state to aver ownership in the heirs of Perry Young, which were his four children as laid in the indictment, the record showing that his wife was dead. It is the appellant's contention that ownership should have been laid in Perry Young. But he overlooks the fact that a dead man can have no property in goods and chattels, and that an indictment laying the ownership in the deceased would have been improper. The proper way of laying ownership in such a case should be in executor or administrator, or else in the person or persons entitled to the immediate possession and con-

trol of the property. 12 Ency. of Pl. and Pr., page 971. This was exactly what was done in this case, the ownership having vested in the four sisters and brothers the title was properly averred to be in them. PER CURIAM.

ON SUGGESTION OF ERROR.

Appellant was indicted and convicted of stealing a cow, alleged in the indictment to have been the property of Ethel, Matthew, John, and Perry Young. The evidence discloses that the cow, when stolen, was the property of "old man" Perry Young, who died after it was stolen and before the finding of the indictment, leaving as his heirs at law his children, the persons alleged in the indictment to be the owners of the cow. No objection was made to this variance between the proof and the indictment, but two instructions were granted appellant charging the jury that ownership must be proven as laid in the indictment. If appellant desired to avail himself of this variance he should have objected specifically on that ground, so that the attention of the court and opposing counsel might be called thereto, and, having failed so to do, he cannot now avail himself thereof, for the reason that had such an objection been made, the indictment could have been amended to correspond with the proof. Section 1508, Mississippi Code 1906; *Foster v. State*, 52 Miss. 695.

Affirmed.

GREEN v. BOUNDS.

[72 South. 1001.]

1. SET-OFF AND COUNTERCLAIM. *Application of firm assets. Agreement. Pleading. Designation of pleading.*

Where appellant and his brother were equally interested in a lot of logs and sold and delivered them to appellee under an agreement assented to by all parties interested therein, that one-half of the proceeds thereof should be retained by appellee, the buyer, and applied to the payment of the account due him by appellant, if he failed to so apply these payments, he and not appellants must suffer therefor.

2. PLEADING. *Designation of pleading.*

The character of complaint or defense is not determined by what it is styled in the pleadings, but by what it in fact is.

APPEAL from the circuit court of Green county.

HON. J. L. BUCKLEY, Judge.

Suit by J. Bounds against B. E. Green. From a judgment for the plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

J. W. Backstrom, for appellant.

The testimony of the appellant is that appellee Bounds or his agents or Scalers had notice that these logs were owned jointly by B. E. Green and W. W. Green, and this being the case it was the appellee's duty to apply one-half the logs to appellant's account. It might be argued that appellee had no such notice, but this cannot be availed of, for the reason the case was decided upon a peremptory instruction, and I take it, that it is a well-settled principle of law, that, where a peremptory instruction is given, the losing party is entitled, upon the review of the action of the court, to have all facts in his favor considered as true. *McCaughn v. Young*, 37 So. 839. This being true the appellant in this case

has a right to have all facts bearing out his set-off to be taken as true upon the review of this case.

These logs that appellant claims as a set-off, one-half of which was his, may have been sold by the said W. W. Green as his logs, and credited up by J. Bounds to the credit of W. W. Green, and if so was an unlawful conversion of same by the said W. W. Green and was by him applying partnership property to the payment of his individual debts, as this court said in the case of *Buck v. Mosley and Malory*, 24 Miss. 170.

It seems that from the holding of the court in the above case that the appellant here would have a right to sue the appellee for the value of his one-half interest in the logs delivered, and that being the case he certainly would have the right to use the same as an off-set in an action involving the same subject-matter and between the same parties.

This court also held in the case of *Robinson v. Aldridge*, 34 Miss. 352. A partner has no right to bind a firm by executing a note in their name in discharge of his private debt."

In the case at bar, it is a case where one partner applied the assets of the firm to the payment of his individual indebtedness, and we submit the lower court erred in limiting the set-off to the two hundred and fifty dollars, and not letting the full amount of the set-off go to the jury.

The appellate court of Alabama in the case of *Grossett et al. v. Morrow*, 58 So. 799, held in passing upon assets of partnerships. "One member of a partnership cannot appropriate the assets of the firm by transferring it in satisfaction of or as security for his individual debt, without the authority or consent of the other members of the firm, whether or not the transferee knew that it is partnership property that it so dealt with." Citing also *Cannon v. Lindsey*, 85 Ala. 198, 3 So. 676; *Cowen v. Eartherly Hardware Company*, 95 Ala. 324, 11 So. 195.

In requesting a peremptory instruction the evidence must be taken most strongly against the party asking for the instruction, and for this reason the lower court erred in granting the instruction, and not letting the full amount of the off-set go to the jury.

White & Ford, for appellee.

We have read carefully all of the cases cited by appellant. The two cases cited on the proposition involved in this case, we think are in our favor, if they could be in any sense applicable to the question here involved. The substance of appellant's cases is that "one member of a partnership cannot appropriate the assets of the firm by transferring it in satisfaction of his individual debt." Therefore Mr. B. E. Green could not have set-off the entire claim of the partnership against Mr. Bounds. The claim could not be split up and had not been split up. There was no mutuality. Mr. W. W. Green was not a party to the suit. There had been no accounting of the partnership affairs and a stating of an account so far as the record shows. To allow a set-off such as appellant is contending for in this case would open up the way for W. W. Green, after this suit is over, to sue Mr. Bounds and claim that he has never gotten his half and it would be difficult to identify the different halves before the matter was finally closed. We fail to see how this account in favor of Green and Green could be set-off without W. W. Green being a party to the suit in any way.

"A set-off is in the nature of a cross action, and in a joint action by several plaintiffs, their separate debts to the defendant cannot be set off against their joint demand." *Walter Denny & Co. v. Wheelwright*, 60 Miss. 733.

In the same case it was laid down. "The several promises of the individual members of a firm to pay a debt cannot, in a joint action by the firm, be set-

off by the defendant against the joint demand of the plaintiffs, although each member of the firm might be liable to the defendant in a separate action against him on his particular promise."

In *Bullard v. Dorsey*, 7 S. & M. 9, that "A set-off must be mutual; that is, between the same parties" and further, "In an action by two persons, the defendant cannot set-off a debt due him by one of them," citing *Chitty on Contracts*, 328.

Certainly therefore when the situation is reversed the same rule of law would apply and when a person is sued by one person he cannot set-off a claim two persons own against the one who sues, especially when the party attempting to set-off the claim does own the entire claim and the interests of the different parties have not been ascertained.

In a suit by two joint payees in a promissory note against the maker, the latter cannot plead as a set-off, a debt due him by one of the plaintiffs. In such a case there is a want of mutuality." *Walker v. Hall*, 66 Miss. 391.

"A mutual account is one where there must be reciprocal demands and charges by each party against the other, like accounts between merchants. If the demand is only on one side the account is not mutual." *Hoover Commercial Co. v. Humphrey*, 107 Miss. 810.

SMITH, C. J., delivered the opinion of the court.

This is an action by appellee to recover from appellant the sum of five hundred sixty-seven dollars and twelve cents, balance alleged to be due on an account consisting of several items for money loaned. Appellant's claim is that certain credits due him have been omitted from the statement of the account filed with appellee's declaration, and that he, in fact, owes appellee ten dollars and forty cents only. There was a verdict and judgment for appellee in the sum of three hundred forty-one dollars and thirty-nine cents.

The evidence discloses that appellant and his brother, W. W. Green, entered into a contract to sell and deliver logs to appellee. Appellant owned the land from which he and his brother intended to cut the logs, and in order that their contract with appellee might be complied with they entered into an agreement that W. W. Green would, at his own expense, cut and deliver the logs to appellee, and that they, appellant and his brother, would divide the money received therefor from appellee equally between them.

After the delivery to appellee of a portion of the timber covered by this contract, he agreed to advance appellant the sum of eight hundred and fifty dollars, and, according to the evidence introduced in behalf of appellant, it was agreed between them that appellee owed appellant the sum of two hundred and fifty dollars, one-half of the purchase price of the logs theretofore delivered, which amount would be credited by appellee upon the eight hundred and fifty dollars to be advanced to appellant. It was also agreed between them, according to the testimony of appellant, that when logs should be thereafter delivered one-half of the price to be paid therefor should be credited upon the amount due him by appellant. The logs thereafter for the most part were delivered by W. W. Green, who, according to his testimony, instructed appellant or his agent to credit one-half of the money to be paid therefor to himself and one-half to his brother, B. E. Green. Instead of doing this, the entire amount was each time credited to the individual account of W. W. Green, who seems to have obtained from appellee money and supplies sufficient to consume the amounts so credited to him. He claims, however, to have been unaware that he was being credited with more than his share of the proceeds of the sale of the logs. All of this defensive matter was denied by appellee.

At the conclusion of the evidence the court instructed the jury:

“That under no circumstance in this case can the defendant set off against plaintiff more than two hundred fifty dollars and twenty-four cents, being the amount of the credit which the defendant claims that he had on the books of the plaintiff when he, the defendant, arranged to borrow the eight hundred and fifty dollars from the plaintiff as shown on plaintiff’s account.”

In the brief of counsel for appellee it is said that the sole question presented by this record is:

“Will the appellant be allowed to set off, in a suit by appellee against him individually, a claim of a partnership composed of appellant and another against appellee?”

As we understand the record, the question presented is not one of set-off, but simply one of payment. If the evidence introduced in behalf of appellant be true, the logs were delivered to appellee under an agreement, assented to by all parties interested therein, that one-half of the proceeds thereof should be retained by appellee and applied to the payment of the account due him by appellant; and if he failed to so apply these payments, he, and not appellant, must suffer therefor.

It is true that in appellant’s affidavit denying the correctness of the account sued on and setting up the additional credits to which he claims to be entitled he states “that he is due the following amounts as additional credits and which he claims as set-offs, as follows,” etc., but the character of a complaint or defense is not determined by what it is styled in the pleadings, but by what it in fact is.

Reversed and remanded.

SOUTHERN WOOD FIBER COMPANY v. THORNTON.

[72 South. 1002.]

EXECUTION. *Claim of third person. Sufficiency of evidence.*

Where plaintiff makes out a *prima facie* case it is error for the court to give a peremptory instruction for defendant.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Execution by the Southern Wood Fiber Company on a judgment against C. J. Thornton in which Mrs. Nellie T. Thornton, his wife, filed a claimant's issue to the property taken under execution and levy. From a verdict for claimant, plaintiff in execution appeals.

The facts are fully stated in the opinion of the court.

Stevens & Cook, for appellant.

R. S. Hall, for appellee.

SYKES, J., delivered the opinion of the court.

The appellant, Southern Wood Fiber Company, obtained a judgment in the circuit court of Forest county against C. J. Thornton, which judgment was duly enrolled according to law, and execution was issued upon this judgment and levied upon certain personal property (stock and cattle) claimed to belong to C. J. Thornton, Mrs. N. T. Thornton, the appellee here, filed a claimant's affidavit to this property. On the trial of the right of property, after the appellant had introduced its testimony, on motion of appellee, the same was excluded, and a peremptory instruction given to find for the claimant. Verdict and judgment were duly entered for the appellee, from which judgment this appeal is prosecuted.

The property levied on under this execution consisted of cattle, and possibly one or two horses and mules. The testimony introduced by the judgment creditor, the appellant here, showed that a part of this property was on a plantation about four or five miles from Hattiesburg, commonly known as the "Thornton

place." Whether it belonged to Mr. or Mrs. Thornton is not shown. The testimony, however, shows that Mr. Thornton, the execution debtor, had the active management and control of this plantation, making the arrangements with the tenants who worked the same, and also making arrangements with them to care for and look after these cattle. The testimony further shows that Mr. Thornton, from time to time, went out and had cattle butchered on the place. The cattle levied on, which were not on this plantation, were in the possession of a party by the name of Davis. The testimony shows that Mr. Davis came into possession of these cattle through an arrangement he made with Mr. C. J. Thornton, who had a drug store in Hattiesburg. At the time this arrangement was made some of the cattle were at the Thornton home in Hattiesburg. Mr. Davis arranged with Mr. Thornton to let him have the milk cows and that he would deliver to Mr. Thornton, at his drug store, all of the milk he wanted, at a reduced price, and that he would also turn over to him (Thornton) all the calves from these cows. There was no testimony, whatever, that the cattle belonged to the claimant, the appellee here, except that part of the testimony of Mr. Davis which shows that after there was talk of an execution being levied on these cattle Mr. Thornton called him over the phone and told him to tell any one who asked him that the cattle belonged to Mrs. Thornton. The testimony of the witnesses introduced by the appellant showed that the execution debtor, C. J. Thornton, was in the entire management and control of the property levied on. It is true that he may have been the manager or agent for his wife. However, the claimant failed to introduce any testimony whatever upon this proposition. We therefore think that the appellant made out a *prima facie* case, and that it was error to grant the peremptory instruction and exclude the testimony. *Ketchum & Cummings v. Brennan*, 53 Miss. 596.

Reversed and remanded.

Brief for appellant.

[112 Miss.]

HILL v. STATE.

[72 South. 1003.]

CRIMINAL LAW. *Appeal. Error. Examination of juror. Race prejudice.*

Where on a trial of a negro for murder, a juror was asked on his *voir dire*, whether he had any prejudice against the negro as a negro that would induce him to return a verdict on less or slighter evidence than he would return a verdict of guilty against a white man under the same circumstances, it was reversible error not to allow the juror to answer.

APPEAL from the circuit court of Bolivar county.

HON. WM. A. ALCORN, Jr., Judge.

Joe Hill was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

Duncan H. Chamberlain, for appellant.

The right to a fair and unprejudiced jury is at the very foundation of the right of trial by jury. If there are any doubts as to the qualification of a venireman, they should be solved against the one challenged. A party submitting his case to the arbitrament of a jury, is entitled to a jury, every member of which is a qualified juror—above all doubt or question. *Theobald v. Transit Co.*, 191 Mo. 395, 428, 90 S. W. 354, 362, quoting approvingly the rule announced by Mr. Chief Justice MARSHALL of the supreme court of the United States in Burr's Case, that light impressions which may be fairly supposed to yield to the testimony offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror, but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him, and referring to many cases holding that an unbiased jury is of the right of all litigants, our supreme court has said: "The streams of

justice should be kept pure and free from prejudice. In the administration of justice the courts and all judges, as well as the jurors, should, as far as human precaution can avail, be kept free from bias or prejudice. . . . A man may have an impression one way or the other, even an opinion, that can be reached and dealt with and possibly removed so that he will be a fair, competent juror. Not so with prejudice. It is too strong in its hold to be easily thrown off. Its baneful presence, working on us secretly and insidiously, may, unconsciously to our own selves, mold our minds." *Carroll v. United Rys. Co. of St. Louis*, 137 S. W. 303, excerpts taken from pages 307-308.

In *Pinder v. State*, 8 So. 837, the supreme court of Florida concludes its opinion in the following words: "Upon the ground that the court below erred in not permitting the examination of the jurors upon the *voir dire* on the line herein pointed out, we think the judgment and sentence of the court below should be reversed and a new trial granted, and it is so ordered." Citing *State v. Madoil*, 12 Fla. 151; *Pierce v. State*, 13 N. H. 536; *People v. Reyes*, 5 Cal. 347; *People v. Car Soy*, 57 Cal. 102; *People v. Christie*, 2 Park. Crim. R. 579; *Jones v. State*, 2 Blackf. 475; *Lester v. State*, 2 Tex. App. 432; *Milan v. State*, 24 Ark. 346.

To show to what lengths some of our southern courts have gone in their zeal to safeguard negroes against the danger of prejudiced jurors, we need only cite the case of *Frederick v. State*, wherein the court of criminal appeals of Texas (pronounced by the supreme court of Oklahoma to be the best criminal tribunal in the world), delivered itself as follows: "The bill of exceptions with reference to the questions propounded to the jurors was as follows: 'On the trial of the case when several members of the special venire were being examined on their *voir dire*, counsel for defendant asked several venireman whether or not, under the same facts and circumstances, he could and would render the same

verdict in a case where a negro had killed a white man as in a case where a white man had killed a negro, the evidence being the same; and, when said venireman answered in the affirmative, defendant's counsel asked the question as follows: Under the same facts and circumstances, could and would you render the same verdict in a case where a negro killed a white man for insulting his (the negro's) wife as in a case where a white man killed a negro for insulting his (the white man's) wife? Which was objected to by the counsel for the state, and said objection was by the court sustained, to which action the appellant excepted. If the court had refused to permit the first question, appellant's contention would come directly under the rule laid down in *Lester v. State*, 2 Tex. App. 432. However, an answer to the question whether or not they would, under the same facts and circumstances render the same verdict in the case where a negro had killed a white man as where a white man had killed a negro was permitted by the court. But, when appellant desired to further probe the consciences of the jurors by asking them a question presenting the matter of prejudice upon the very issue involved in the case, the court refused to permit the question to be answered. The right to ask a question of this character at all is based upon the idea of a certain race prejudice which, from common experience, is recognized to exist to a greater or less extent, on the part of southern people of the Anglo-Saxon race against the negro; and it follows, if an interrogatory of this character is permissible, the question should go to the full extent, and not merely half way. . . . If the answer had not shown prejudice on the part of said jurors, or any of them, still it may have furnished appellant some basis upon which he might have exercised his right more intelligently to avail himself of his peremptory challenges."

Frederick v. State, 45 S. W. 489— excerpts from pages 590, 591, in this connection, see note on "Hypo-

thetical Question in Examining Juror on *Voir Dire*," and authorities collated thereunder at page 680, vol. 1913D, Annotated Cases. Also 15 Ann. Cas. 584; 88 Miss. 800; *Basye v. State*, 63 N. W. 811.

The doctrine is sustained by *Railroad Co. v. Buttolf*, 66 Ill. 347; *Watson v. Whitney*, 23 Cal. 375; *State v. Godfrey*, Brayt. 170; *People v. Car Soy*, 57 Cal. 102; *State v. Bresland* (Minn.), 61 N. W. 450.

Ross A. Collins, Attorney-General, for the state.

The appellant, in his first three assignments of error, released a broadside of criticism and authorities against the action of the court in refusing to permit a certain line of interrogatories to the jury on their *voire dire* examination. Appellant's counsel sought to ask the prospective jurors certain questions purporting to ascertain if they had any prejudice against the negro as a negro. It is to be noted that the record shows that the appellant in this case is a negro as was, also, the man killed by him. Each and every witness, save one, who testified only on the matter of venue were all of the negro race. The trial judge had, in the exercise of the duty and authority conferred on him, interrogated the jury under oath as to whether or not they could form a fair and impartial verdict in the case, and as to whether or not they had any bias, prejudice, or ill-will towards the defendant that would prevent them from doing so. This court has heretofore approved a refusal of a lower court to give an instruction whereby the jury were told that they should try a negro by the same standard applicable to a white man. It is an elementary fact, recognized by even the most untutored mind, that an oath to try the case fairly and impartially, without bias, prejudice or ill-will toward the defendant, naturally and necessarily implies that they will try him as a man accused of crime and not in some peculiar manner because he is a negro. The giving of an instruction, or

the asking of such questions relative to this kind of prejudice, constitutes an imputation on the integrity of the jurors and should not be allowed. I grant that where the accused is of a different race from that of the deceased it may, under some circumstances, be proper to permit such questions, and the courts have held that on the trial of a white man for the murder of a negro, that it was not improper to ask the veniremen whether they could, upon the same evidence, return the same verdict against a white man for killing a negro as for killing another white man. *Lester v. State*, 2 Tex. App. 232; *State v. McAfee*, 64 N. C. 339. It has also been held proper to ask a jury upon the trial of a Chinaman if: "Other things being equal, would you take the word of a Chinaman as soon as you would that of a white man?" *People v. Gar Soy*, 57 Cal. 102. But it is well settled that the court may exercise its sound legal discretion in respect of the pertinency of the questions put and the limits to which the examination shall be extended. *Thompson on Trials* (2 Ed.), Par. 101.

I earnestly submit that the questions so strongly complained of were properly excluded from the jury as there was nothing in the case to suggest that race prejudice had or could be, engendered into the minds of the jury and a suggestion of such prejudice by the given questions would have been improper.

The appellant cites a long array of authorities on the abstract principle relating to the right of the accused to a fair and impartial jury, and the principle contended for by me is, in no wise, controverted by any of the authorities cited by him. The appellant cannot say that he was embarrassed in his defense, or that by reason of the court's refusing to permit these questions he obtained other than a fair and impartial trial and in the absence of any showing in this respect, this court will not take cognizance of such complaint.

POTTER, J., delivered the opinion of the court.

Joe Hill, the appellant in this case, was convicted of murder in the circuit court of Bolivar county, and sentenced to death, and prosecutes his appeal to this court.

On the *voir dire* examination of a venireman, Will Dillard, counsel for appellant propounded to said proposed juror the following question:

"Mr. Dillard, have you got any prejudice against the negro, as a negro, that would induce you to return a verdict on less or slighter evidence than you would return a verdict of guilty against a white man under the same circumstances?"

Question of similar import were propounded to two other proposed jurors during the progress of the *voir dire* examination, and upon objection by counsel for the state the court ruled that the questions propounded were not competent. We think the trial judge erred in refusing to allow the jury to be examined with reference to race prejudice. The defendant on trial was a negro, and was being tried by white men. If for no other purpose than to exercise intelligently his right to peremptorily challenge jurors, the defendant had a right to inquire with reference to any bias or prejudice on account of race that might exist in the mind of any juror tendered to him. Under the circumstance in this case it was fatal error to deny the defendant this right.

As suggested by able counsel in his excellent brief, how else could appellant have guarded against race prejudice figuring in the determination of his trial than by subjecting the jurors on their *voir dire* examination to a line of questioning such as was presented to the court in this instance? It is only by asking questions of the nature of the above question that it is possible for counsel to elicit from a venireman whether or not there exists in his breast race prejudice, perhaps calculated to do the defendant irreparable injury in the trial of his case. In the case of *Pinder v. State*, 27

Fla. 370, 8 So. 837, 26 Am. St. Rep. 75, the supreme court of Florida says:

"It appears from the record that when the jury was being impaneled who tried the accused, and when the jurors were being tested upon the *voir dire* as to their competency, etc., the prisoner's counsel propounded to J. F. Geiger and to other jurors the following question: 'Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?' which question the court below refused to allow to be propounded to the jurors upon their *voir dire*, and refused to allow counsel in the cause to propound any questions to the jurors upon the *voir dire*; the court itself insisting upon propounding all questions to the jurors touching their competency, and propounding only such questions to them as are in express terms provided for in section 10, p. 446, McClel. Dig. The refusal of the court below to allow the question quoted above to be propounded to the jurors upon the *voir dire* is assigned as error, and will be considered first. We think the court erred in refusing to permit this question to be propounded to the jurors. Though the question is not in express terms provided for in the statute above cited, yet it was a pertinent, and, as we think, proper, question to test fully the existence of bias or prejudice in the minds of the jurors. It sought to elicit a fact that was of the most vital import, to the defendant, and a fact, too, that if existent, was locked up entirely within the breasts of the jurors to whom the question was propounded, a knowledge of the existence of which could only be acquired by interrogating the juror himself" citing *State v. Madoil*, 12 Fla. 151; *Pierce v. State*, 13 N. H. 536; *People v. Reyes*, 5 Cal. 347; *People v. Car Soy*, 57 Cal. 102; *People v. Christie*, 2 Parker Cr. R. (N. Y.) 579; *Jones v. State*, 2 Blackf. (Ind.) 475; *Lester v. State*, 2 Tex. App. 432; *Milan v. State*, 24 Ark. 346.

Reversed and remanded.

FIDELITY & DEPOSIT COMPANY OF MARYLAND v. MESSER
ET AL.

[72 South. 1004.]

1. REWARDS. *Necessity for knowledge of offer.*

A reward cannot be earned by one who did not know it had been offered; for there can be no acceptance of an uncommunicated offer.

2. SAME.

The publication of an advertisement offering a reward is a general offer to make a contract with any person who is able to perform the required services and meet the conditions of the proposal. The performance of the service or the performance of the condition on which the promise is made, with knowledge, is an acceptance of the offer, and when done concludes the contract. The matter rests exclusively in the domain of contracts involving an offer and its acceptance.

APPEAL from the circuit court of Forest County.

HON. PAUL B. JOHNSON, Judge.

Suit by J. C. Messer and others against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, defendant appeals.

Appellees, who were policemen of the city of Hattiesburg, Miss., receiving a regular monthly salary, brought suit against the appellant to recover two hundred dollars reward for the capture of two bank burglars.

The New Hebron Bank was burglarized by two persons, and the information was telephoned to nearby cities, including Hattiesburg, and the appellees, members of the police force, apprehended the burglars on an incoming train. They were subsequently convicted and sentenced. The bank which was burglarized was insured against burglary in the appellant company, the policy providing, among other things:

"Display Sign.—Upon the payment of the premium due hereunder the Fidelity & Deposit Company will

forward to the bank a sign for display in the banking room, and a metal plate for outside display, . . . these signs reading as follows: 'Insured against burglary, robbery, or hold up by Fidelity & Deposit Company of Maryland, Baltimore, Maryland. One hundred dollars reward for the apprehension and conviction of each person burglarizing, robbing, or holding up or attempting to burglarize, rob, or hold up this bank.' "

The case was tried before a judge, a jury being waived, on an agreed state of facts, which stipulated that the bank had paid the appellant the premium and had obtained the policy of insurance protecting it against loss by robbery, burglary, or holdup, and that said policy was in full force at the time the burglary occurred, and that appellees captured the burglars, who were fugitives from justice. It was agreed also that appellees did not know that there was a reward of one hundred dollars offered by the appellant for the apprehension of persons burglarizing the banks insured by it against burglary. From the judgment for appellees, this appeal is prosecuted.

Flowers, Brown, Chambers & Cooper, for appellant.

Currie & Currie, for appellee.

SMITH, C. J., delivered the opinion of the court.

The contract here sought to be enforced is one alleged to have been created by the acceptance by appellees of appellant's offer of a reward for the capture of the persons who burglarized the New Hebron Bank. It appears, however, from the agreed statement of facts that when appellees arrested the burglars they did not know that appellant had offered a reward therefor; consequently they cannot be said to have accepted the offer.

112 Miss.]

Syllabus.

"The publication of an advertisement offering a reward is a general offer to make a contract with any person who is able to perform the required services and meet the conditions of the proposal. The performance of the service or the performance of the condition on which the promise is made, with knowledge, is an acceptance of the offer, and, when done, concludes the contract. The matter rests exclusively in the domain of contracts involving an offer and its acceptance. This being true, it logically follows that a reward cannot be earned by one who did not know it had been offered; for there can be no acceptance of an uncommunicated offer." 1 Elliott on Contracts, sec. 51; Clark on Contracts (3d Ed.), p. 49; Lawson on Contracts; *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057.

Reversed, and judgment here for appellant.

Reversed.

ROAN v. CITY OF HATTIESBURG.

[72 South. 1005.]

1. EMBEZZLEMENT. *Offense. Sufficiency of evidence. Statement of owner.*

In a prosecution of a hack-driver for embezzlement under an affidavit charging that he received a two dollar bill of a patron and returned change for only one dollar and refused on demand to pay the patron the sum of one dollar, the court held that the evidence as set out in the opinion was insufficient to convict.

2. SAME.

In such case the fact that the patron afterwards told the defendant that he had given him the two dollar bill by mistake is immaterial, for the reason that defendant in so far as the criminal law is concerned, was under no duty to accept his unsupported statement and pay him the money claimed on the faith of it.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Tom Roan was convicted of embezzlement and appeals.
The facts are fully stated in the opinion of the court.

D. W. Draughon, for appellee.

Sullivan, Conner & Sullivan, for appellee.

SMITH, C. J., delivered the opinion of the court.

Appellant was tried and convicted in the court of a police justice of the city of Hattiesburg, on an affidavit charging him with the crime of embezzlement, was again convicted upon an appeal to the circuit court of Forest county, and now appeals to this court.

The evidence introduced by the city upon the trial of the cause is that appellant was, on the 25th day of March, 1916, the driver of a public hack, in which one Wiley Blanks took passage from some portion of the city of Hattiesburg to his home, agreeing to pay therefor the sum of fifty cents. Blanks claims that he had with him at the time a one dollar and a two dollar bill; that on arriving at his residence he advised appellant of this fact, and told him that he was afraid he would give him the two dollar bill instead of the one dollar bill, as it was too dark for him to see; and that appellant replied: "If you give me the two, I will give you the right change back." Neither of the parties had a match with which to strike a light, and it was too dark for either of them to tell one bill from the other. Blanks states that both bills were rolled up together in his pocket and that he took one of them and handed it to appellant, who handed back to him fifty cents in change. He discovered his mistake, according to his testimony, on going into his residence and examining the remaining bill by means of a light; that he called on appellant next day for the money, and was told that the bill had been passed on

by him in making change with other passengers. Appellant denied that Blanks told him he had both a one dollar and a two dollar bill, and was afraid that he would give him the wrong one, and states that he handed him what he said was a one dollar bill, and whether it was a one dollar bill or a two dollar bill he gave it to another passenger that night in making change. Blanks demanded of appellant that he pay him the sum of one dollar, which he refused to do, whereupon the affidavit upon which appellant was tried was made.

Assuming for the sake of argument that our statutes defining embezzlement apply to a case of the character here under consideration, the evidence wholly fails to disclose that appellant discovered, at the time Blanks paid him his fare or thereafter, that he had been given by mistake a two dollar bill instead of a one dollar bill, so that it cannot be said that he knowingly converted to his own use the dollar which Blanks claims he should have returned to him. That Blanks afterwards told appellant that he had given him the two dollar bill by mistake is immaterial, for the reason that appellant, in so far as the criminal law is concerned, was under no duty to accept Blank's unsupported statement and pay him the money claimed on the faith of it.

Reversed, judgment of not guilty here, and appellant discharged.

Reversed.

ARMSTRONG ET AL. v. THOMAS ET AL.

[72 South. 1006.]

1. WILLS. *Estates created. Executory devise. Remainders. Supervisor.*

Where a testator by will devised lands to four daughters, with the provision that if any of them died without issue or bodily heirs, her part should go to the surviving sisters or sister, declaring an intention that the daughters should share and share alike, in such case each of the four daughters took a fee, defeasible upon their deaths without issue, leaving one or more of the other devisees surviving them; the limitation over upon the death of each without issue to the survivor or survivors being a valid executory devise.

2. SAME.

In such case where three of the sisters had acquired the interest of the fourth, on the death of one of the three a one-third interest in her share of the estate shifted to and become vested in a surviving sister in fee absolute, there being nothing in the will to indicate that she should take it with the limitation over to which her original share was subject.

3. WILLS. *Estates created. Executory devise. Survivors.*

Where a testator devised lands to his four daughters in fee, defeasible upon the death of any one without issue leaving one or more of the other daughters surviving her, so that the limitation over to the survivor or survivors was a valid executory devise, the deaths of two of the sisters leaving children surviving them terminated their contingent interest in the limitation over and the fee in the surviving sister became absolute and so children of prior deceased sisters took nothing; the word "survivor" meaning one who outlives others and must be given this meaning in devises of this character in the absence of words indicating that such was not the testator's intention.

APPEAL from the chancery court of Monroe county.

HON. T. L. LAMB, Chancellor.

Bill by J. W. Thomas and others against F. Marion Armstrong and others for the cancellation of defendant's claim to land and for the partition thereof. From a decree overruling a demurrer to the bill, defendants appeal.

The facts are fully stated in the opinion of the court.

D. W. Houston, Sr. & Jr., for appellant.

W. H. Clifton, for appellee.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a decree overruling a demurrer to a bill praying for the cancellation of appellants' claim to the land here in controversy and for the partition thereof among appellees as sole owners. The bill, among other things, alleged that Drury Armstrong devised certain lands, embracing that here in controversy, to his four daughters, Jane, Cinderella, Rosaline, and Drury Ann, all of whom survived him. The will provided that:

"Should any of my four daughters die without issue or bodily heirs their portion herein named shall descend to their surviving sisters or sister, and in the distribution of what I have given to my daughters I intend them to be equal respectively to share and share alike."

A part of the land devised was situated in Monroe and a part in Pontotoc county. In 1885 a partial partition of the land in Monroe county was made by the sisters Jane, Rosaline, and Drury Ann, conveying to Cinderella a portion thereof to be held by her in severalty, and she conveying to Jane, Rosaline, and Drury Ann her interest in the remaining portion thereof. In 1887 Drury Ann died without issue, leaving Jane, Cinderella, and Rosaline surviving her, who, after her death, made an oral partition among themselves of Drury Ann's share in the lands in Monroe county that had been released to them by Cinderella in the first partition by which sixty-eight acres thereof were set apart to Cinderella.

Afterwards Jane, Cinderella, and Rosaline sold and conveyed the lands in Pontotoc county and divided the proceeds thereof among themselves. Jane became the wife of J. W. Thomas and died in 1894, leaving

her husband and three children surviving her. Cinderella became the wife of John A. Nabors, and died in 1912, leaving a daughter surviving her. Rosaline died intestate in 1913 without issue.

Part of the money received by Rosaline from the sale of the Pontotoc county land was deposited in bank and a part loaned at interest; she at the time of her death holding a certificate of deposit and a note therefor. Appellees, who are complainants in the court below, are the husband and children of Jane and the daughter of Cinderella. Appellants, defendants in the court below, as we understand the allegations of the bill, are heirs at law of Rosaline, and it seems, though it is not clear from the bill, that they together with the children of Jane and Cinderella constitute all of her heirs. The bill alleged that upon the death of Rosaline the children of Jane and Cinderella became the owners in fee of Rosaline's interest in the land here in question by virtue of the limitation over on her death without issue contained in the will of her father as hereinbefore set out, and prayed that the claim of appellants thereto as her heirs at law be cancelled as a cloud upon their title. The bill also prayed certain relief with reference to Rosaline's personal estate.

As we understand the allegations of the bill no attack is made upon the three partitions hereinbefore set out of the property devised, but that on the contrary it proceeds upon the theory that these partitions are valid, and that the land to which the limitation over upon the death of Rosaline attaches is that set apart to her by these partitions, consequently no question relative thereto is presented to us by this record.

Under the will each if these four devisees took a fee defeasible upon their deaths without issue, leaving one or more of the other devisees surviving them; the limitation over upon the death of each without issue

to the survivor or survivors being a valid executory devise. *Busby v. Rhodes*, 58 Miss. 237; *Halsey v. Gee*, 79 Miss. 193, 30 So. 604; *Ball v. Phelan*, 94 Miss. 293, 49 So. 956, 23 L. R. A. (N. S.) 895; sections 2764 and 2778, Code of 1906. So that upon the death of Drury Ann a one-third interest in her share of the estate shifted to and became vested in Rosaline in fee simple absolute; there being nothing in the will to indicate that she should take it with the limitation over to which her original share was subject. 1 Underhill on the Law of Wills, sec. 352; 40 Cyc. 1513; 30 Am. & Eng. Encl. of Law (2d Ed.), 810.

The limitation over upon the death of Rosaline of the share devised direct to her in the first instance was to take effect upon the happening of two events: First, her death without issue; and, second, leaving one or more of the original devisees, that is, Jane, Cinderella, or Drury Ann, surviving her. Their deaths prior to hers made impossible the happening of the second of these events, thereby destroying the limitation over with the result that the fee in Rosaline became thereby absolute and indefeasible. *Halsey v. Gee*, 79 Miss. 193, 30 So. 604; 24 Am. & Eng. Encl. of Law (2d Ed.), 454. That two of these devisees, Jane and Cinderella, left children surviving them is in this connection immaterial, for upon their deaths prior to that of Rosaline their contingent interest in the limitation over upon Rosaline's death terminated and therefore did not descend to their children. The word "survivor" means one who outlives others and must be given this meaning in devises of this character in the absence of words indicating that such was not the testator's intention. Underhill on the Law of Wills, vol. 1, section 351; 30 Am. & Eng. Encl. of Law (2d Ed.), 810; *Reber v. Dowling*, 65 Miss. 259, 3 So. 654, 7 Am. St. Rep. 651; *Den v. Schenck*, 8 N. J. Law, 29; *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937; *Sullivan*

v. *Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605.

It follows from the foregoing views that the appellants have an interest in the property here in controversy as heirs at law of Rosaline, and that the court erred in overruling the demurrer.

Reversed and remanded.

SIVLEY v. WILLIAMSON.

[72 South. 1008.]

1. **BILLS AND NOTES.** *Negotiability. Note payable to bearer. Bona-fide purchaser. Presumption. Defenses. Payment to person not in possession. Estoppel. Failure to assert title. Pleading. Necessity.*

A note payable to bearer is a negotiable instrument to which the title passes by a delivery of the note and the holder is presumed *prima facie* to be the *bona-fide* owner of it.

2. **SAME.**

Where there was no evidence as to when or how a vice president of a bank secured possession of a note payable to the bank or bearer in a suit by him upon the note, it was error to give a peremptory instruction for the defendant on proof of payment to the bank.

3. **BILLS AND NOTES.** *Defenses. Payment to person not in possession.*

Payment of a note payable to bearer, to a person not in possession of the note is at the risk of the payer.

4. **ESTOPPEL.** *Failure to assert title. Bona-fide purchaser.*

If the vice president of a bank claiming to be the owner of a promissory note was present at the time of the payment of the note by the payer to the bank and knew and understood what was going on, then it was his duty, certainly as an officer of the bank to have explained the true situation to the payer and failing to do so, he would be estoppel from maintaining a suit on the note against the payer.

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Brief for appellant.

5. PAYMENT. *Pleading. Necessity.*

Under our statute payment is an affirmative defense and should be specially pleaded or notice given of it under the general issue.

6. BILLS AND NOTES. *Payment. Officer. Paper.*

An officer of a bank has a right in good faith to buy its negotiable paper for a valuable consideration and a payment to the bank after such purchase does not relieve the payer from liability to the officer.

APPEAL from the circuit court of Newton county.

HON. J. D. CARR, Judge.

Suit by W. B. Sivley against J. W. Williamson. From a judgment for defendant, on peremptory instruction, plaintiff appeals.

The facts are fully stated in the opinion of the court.

E. L. Trenholm, attorney for appellant.

It would be idle to cite authorities upon the proposition that the plaintiff made out a *prima-facie* case upon introducing in evidence a note (admittedly executed by defendant) payable to bearer, which note was in due legal form.

The question, therefore, for determination, is whether the defendant, by his evidence, met and overcame this *prima-facie* case. There are three considerations: (1) on the face of the pleadings, coupled with defendants evidence; (2) was payment made to the plaintiff; (3) Was payment to the bank satisfaction of plaintiff's demand because he was an officer and director of the bank. It was upon this last question that the trial court gave the instruction for the defendant, and in this we say he was surely in error.

Was payment made to the plaintiff.

While all the defensive evidence for the defendant was upon the theory of payment, it is conclusive from the evidence of the witness Williamson that payment was to the bank and not to the plaintiff. Witness Munn, in his vindictive testimony, "thinks" payment was

made to plaintiff. This conflict is wholly in the testimony offered by defendant, and, if a question at all, was one for the jury. But Williamson, defendant, and his receipt, are absolutely conclusive of this question. Payment was to the bank.

J. S. Rhodes, for appellant.

The appellant made out his case, and there was no testimony to show that the note had ever been paid to him, in fact the very receipt itself given appellee by the said bank, shows that payment was made to the bank, and he was therefore entitled to the peremptory instruction asked for and refused by the court.

The court erred in granting the appellee a peremptory instruction. In the first place this instruction should have been given the appellant, in which event it could not have been given to the appellee also.

According to the case of *I. C. R. R. v. State*, 48 So. 561, "Where a case is disposed of by a peremptory instruction, an assignment that the court erred in giving it brings the entire case up for review, and permits arguments for and against such exception to be made for the first time on appeal," we are permitted to review the entire case and to make new arguments in this court. I therefore wish to call the court's attention to this proposition, there was an issue of fact which should have been passed upon by a jury, assuming that the contention of the appellee is correct. There is testimony in the record on page 17 to show that the appellant was the general manager of the said bank in addition to being vice-president and a director, and if he was, the lower court no doubt was influenced by the idea that as such, he should have known that the note was paid to the said bank. The testimony for the appellant shows that Mr. W. B. Sivley was merely the vice-president and a director in said bank. There is therefore a material variance between important facts, in the case,

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Brief for appellee.

and this matter should have been passed upon by a jury, and the lower court erred because it was not submitted to a jury.

As the record shows that the appellant owned the note as an individual, and that he did not have any actual knowledge of the fact that the appellee had paid it to the said bank, and that as the appellant did not occupy such a position with the said bank that the knowledge of the payment of the note to the bank could be imputed to him, it was therefore error for the lower court to grant the appellee a peremptory instruction, and the trial judge likewise committed serious error in not granting the appellant a peremptory instruction. Wherefore the appellant prays that the judgment of the lower court may be reversed and that a judgment be entered in this court for him for the amount sued for together with reasonable attorneys' fees and costs.

Appellant respectfully contends though that should the court not render this kind of a verdict, it should reverse and remand the case for a new trial.

W. I. Munn, for appellee.

There is no dispute whatever about the payment of the note; J. W. Williamson did not nor has he ever denied the execution and the delivery of this note for four hundred and ten dollars to the Merchants & Farmers Bank, but after it was executed and delivered and a short time after it was due, he went to the usual place of business of the said Merchants & Farmers Bank with the money in his hand and paid it to the said Merchants & Farmers Bank, delivering the cash to H. F. Sivley, cashier of the said bank and who was also the son of the appellant, W. B. Sivley, and also the son of Mrs. W. B. Sivley, the wife of the appellant. Williamson also testified in his examination on the witness stand that he had considerable business with the said

Merchants & Farmers Bank on or about this time, and that also the appellant, W. B. Sivley was at that time vice-president of the said Merchants & Farmers Bank, and was also the general manager thereof, and was at that time one of its principal stockholders and was also one of its principal creditors; Williams also testified that when he would go to the bank on or about the time this note was paid, that is to say, at the time of the payment of the note and prior and subsequent thereto, that he frequently saw the appellant in and around the bank, and that on the date that this note was paid it was his impression that W. B. Sivley was in the bank, and that the money due on the note with interest thereon was paid in his presence; surely there can be no mistake about this matter. There is no conflict in the testimony; Williamson says he paid the note; Williamson says that he paid it to the cashier of the bank, he thinks in the presence of W. B. Sivley; Williamson says that the appellant was the business manager and vice-president of the bank and that he, the said W. B. Sivley, was in and around the bank nearly every day; no one denies these facts; the appellant offered no rebutting testimony of any kind whatever to show or that tended to show that these facts were not true; surely this was sufficient proof to overcome the presumption that the appellant was not a *bona-fide* holder for value before maturity without notice, viewing the case as though the appellant was not in anywise connected with the Merchants & Farmers Bank, either as a stockholder, vice-president, general manager or other officer in the bank. We do contend, and we insist that there is sufficient proof in this record to impute knowledge to the appellant as to the payment of this note, and that if he had been a stranger to the bank, that under the testimony in this record as to his knowledge of the payment of this note, he could not and ought not to recover against the appellee because some of the witnesses who testified for the appellee in the circuit court said that they were

under the impression that Mr. W. B. Sivley was there in the bank with his son Hamilton at the time that the note was paid, and if he was there, then it follows that payment to the cashier of the Merchants & Farmers Bank was payment to him; if he owned the note, and if he was the holder of the note at that time, it stands to reason that he got the money on the note, and if he didn't get the money, he had an opportunity to get it; it was his duty and his privilege to have spoken to his son, Hamilton, at that time and told him about it, otherwise he is now estopped and cannot be heard to complain.

SYKES, J., delivered the opinion of the court.

This suit was instituted by the appellant, plaintiff in the court below, in the circuit court of Newton county, upon a promissory note signed and executed by the appellee for the sum of four hundred and ten dollars, dated April 4, 1912, due May 4, 1912, payable to the Merchants' & Farmers' Bank or bearer. The appellee, J. W. Williamson, pleaded the general issue and also a special plea to the effect that he had been discharged of this indebtedness in a bankruptcy proceeding. The note also provided for reasonable attorneys' fees. At the trial in the court below, plaintiff introduced the note, proved what a reasonable attorneys' fee was, and rested. The defendant introduced testimony which tended to prove that the plaintiff, W. B. Sivley, was the vice-president of the payee bank, and was also a director and one of its principal stockholders; that he was in and around the bank a great deal, especially for a time before the bank went into the hands of a receiver, which was about June 11; that on June 1st, after the maturity of the note, the defendant went to the bank and told the cashier, H. F. Sivley, who was a son of the plaintiff, that he desired to pay this note. The cashier looked upon his note register, and told him the amount of principal and interest, and took the money in payment of same. He then looked for the note, and, after some minutes, returned and told

the defendant that he was unable to find the note. The defendant says that, at the time of this alleged payment, he does not know whether Mr. W. B. Sivley, the plaintiff, was in the bank, or not. The testimony of one witness, however, which is not very positive on this point, would indicate that the plaintiff was present at the time of this attempted payment. A receipt was given the defendant by the cashier of the bank. There is also some testimony in the record to the effect that W. B. Sivley at one time was the general manager of the bank. This testimony is contradicted by other witnesses, who say that plaintiff was nothing more than a vice-president. After the introduction of all the testimony, the court declined a peremptory instruction requested by the plaintiff, and gave one requested by the defendant. In this the lower court committed error. A note payable to bearer is a negotiable instrument to which the title passes by a delivery of the note. The holder is *prima facie* presumed to be the *bona-fide* owner of it. *Craig v. City of Vicksburg*, 31 Miss. 216; *Gillespie v. Planters' Oil Mill*, 76 Miss. 406, 24 So. 900.

Payment of an instrument of this character to a person who is not in possession of it is at the risk of the payer. 7 Cyc. 1029. There was no proof introduced by the defendant to show that the plaintiff was not the *bona-fide* owner of this note. It is true that there was some testimony to the effect that the plaintiff took possession of the notes belonging to the bank shortly before its failure, and that there was subsequently a compromise between him and the bank by his returning to the bank certain notes. The testimony also is to the effect that the bank was indebted to the plaintiff and his wife in the sum of about thirty thousand dollars at this time. However, the record in this case does not show whether the note here sued on was one of the notes taken possession of, as above set out, nor the facts as to why or how they came into possession of these notes.

If the plaintiff was present at the time of the attempted payment of this note by the defendant and knew and understood what was going on, then it was his duty, certainly as an officer of the bank, to have explained the true situation to the defendant. Failing to do so, he would be estopped now from maintaining this suit.

Under our statutes payment is an affirmative defense, and should have been specially pleaded or notice of it given under the general issue. Neither was done in this case.

It is the contention of the appellee that, since the appellant was the vice president and, as he contends, the general manager of this bank, then the alleged payment to the bank would be binding upon him. There is no merit in this contention. An officer of a bank has a perfect right in good faith to buy its negotiable paper for a valuable consideration.

Reversed and remanded.

JONES v. MOBILE & OHIO RAILROAD COMPANY.

[72 South. 1009.]

CARRIERS. Ejection of passenger. Demand for fare.

- Where an ignorant negro woman boarded a railroad train with an order for a ticket sent her by her husband which resembled a ticket and which she ignorantly believed to be a ticket was put off by the conductor after taking up the order and without first demanding that she pay her fare or get off at a station and buy a ticket, the railroad company was liable in damages, since she was a passenger acting in good faith.

APPEAL from the circuit court of Monroe county.

HON. CLAUDE CLAYTON, Judge.

Suit by Betty Jones against the Mobile & Ohio Railroad Company. From a judgment for defendant on a peremptory instruction, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Paine & Paine, for appellant.

We desire to answer only the case cited by counsel in his brief, to wit: *Broyles v. Central of Ga., R. R. Co.*, 52 So. 81. This case does not touch the case at bar side, edge, or bottom. In the *Broyles* case the plaintiff was held to be a trespasser on the train on account of the reason that she obtained passage by fraud in riding on a pass issued to some other party. In the case at bar appellant was rightfully on the train under contract for passage for which she had paid the sum of four dollars and eighty-five cents; certainly no fraud can be laid at the door of appellant. Appellant was not a trespasser and the *Alabama*, case cited is not in point.

Counsel state in their supplemental brief on page 2 that under this *Broyles* case "it was her duty to offer to pay whether demanded of her by the conductor or not." This certainly was not the holding of the court in that case. But on the contrary it is decided that: "Where a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay his fare until his fare is demanded . . . but after demand is made, and he has the opportunity of paying and, he fails to do so, the presumption ceases unless some good excuse is shown for not then paying." This quotation is found on page 86 of 52nd Southern Reporter. Counsel then was in error in stating that this case decided the rule that the person must offer to pay the fare, whether demanded of her or not.

The facts in the case at bar show that after this negro woman was permitted to get on the train on account of the negligence of the porter of appellee, that her ex-

planation was made and was not accepted, the conductor did not demand a cash fare, but on the contrary gave her no opportunity of paying a cash fare, and sent his porter into the negro car in which the appellant was riding and told her peremptorily to get off of the train.

Counsel for appellee contend that this court must be governed by the Alabama law in deciding this case. This point was not raised in the trial court and was not raised by counsel in this court until he filed his supplemental brief. But if that be the correct rule, we then say that the Alabama law is stronger for appellant than the Mississippi law and we desire to call the court's attention to two cases from Alabama, to wit: *Robertson v. L. & N. R. R. Co.*, 37 So. 831; *L. & N. R. R. Co. v. Cannon*, 48 So. 64.

These two cases are strong authority for us to the effect that the appellee is liable for the negligence of the porter in permitting and directing the appellant to get on the train without having a ticket. We desire to quote one passage from the *Robertson case*, *supra*, as follows to wit, from the syllabi:

"A passenger who sustains damages by reason of having been directed by the carrier's employees to take the wrong car, is entitled to recover whether or not the act of the employees was negligent, inadvertant, wilful, knowing or malicious; . . . The passenger may rely on a direction of trainmen as to the proper car to be taken and is not chargeable with contributory negligence for following that direction, although a mistake resulting therefrom might have been avoided by making other inquiries or taking other steps of that nature."

In the *Robertson case* the passenger was misdirected by the flagman. In the case at bar the appellant, who had contracted for passenger was misdirected and misinformed by the porter. We submit there is no difference between the *Robertson case* and the case at bar.

We submit that the case should be reversed and remanded.

J. M. Boone, for appellee.

Since writing the original brief for the appellee in this case we have come across the case of *Broyles v. Central of Georgia Railroad Co.*, 166 Ala. 616, 52 So. 81; 139 American State Reports, 50. This Broyles case was decided by the supreme court of Alabama in February, 1910, and I will quote from the case as it is reported in 139 American State Reports, 50.

The plaintiff in the Broyles case was riding on a pass that was issued to another party, and the conductor supposing her to be the party whose name was written in the pass, accepted the pass for her transportation and recognized and carried her on his train as a passenger. A wreck occurred on the train and this plaintiff was injured before she reached her destination, in the said wreck; and she brought suit for personal injuries sustained on account of the wreck.

One of the pleas of the defendant in that case was that she was riding on a pass not issued to her, and therefore she was not entitled to ride, and was a trespasser, and the railroad company owed her no duty save not to wantonly or wilfully injure her.

While the plaintiff was testifying for herself she was asked by her attorney: "I will ask you if you had money to pay your fare if it had been demanded?" which question was objected to by the defendant and the objection sustained by the lower court, and the action of the court below was sustained and affirmed by the supreme court.

She was further asked by her attorney: "I will ask you whether or not you would have been willing to have paid your fare if it had been demanded?" and this question was also objected to by the defendant, and sustained by the court, and affirmed by the supreme court—as is shown on page 55 of 139 Amer. Sta. Rep.

This disposes of the argument made by Counsel for the appellant in their brief on page 3 thereof, as follows: "The record affirmatively shows that the conductor gave her no opportunity to pay cash for her passage;"

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Brief for appellee.

and also disposes of the argument on the fourth page of 'appellant's brief, as follows: "From the record in this case this ignorant negress was not allowed even the right to pay her passage after being told she could not make the trip on the ticket she presented." The court evidently clearly holding that it was her duty to offer the money for her cash fare, as the court said:

"Uncommunicated intention or purpose is an inferential fact not capable of direct proof, but must be inferred from facts proven."

In the case at bar no proof was offered by the plaintiff that she had any money at all, or offered any money to the conductor for her cash fare. In the Broyles case the plaintiff was permitted to testify that she had money, yet the court said that it was incompetent to show that she would have paid this money if demanded by the conductor, and that it was incompetent for her to show that she would have been willing to pay, for the reason that it was her duty to offer to pay, whether demanded of her by the conductor or not.

On the same page 55, of the 139th Amer. Sta. Rep., it will be seen that plaintiff's attorney also put this question to his client:

"I will ask you whether you supposed or thought when you boarded the car that you had a right to ride on the pass which was held by your mother?" and this question was also objected to by the plaintiff and the objection sustained by the lower court, and the action of the lower court affirmed by the supreme court—the court holding that "uncommunicated thoughts and suppositions cannot be testified to."

And these rulings of the court effectually dispose of the argument by the appellant's counsel in this case, that the plaintiff had a right to be transported upon this order simply because she thought this order was a ticket that would entitle her to ride on this train. The effect of the court's holding in the Broyles case is that the conductor, who is the superior officer in the handling of the passenger train, could not by his mistake confer

upon a person the rights of a passenger, but that the law of the land and the rules and regulations of the company fixed the rights of passengers and established who were passengers.

So that, even if we concede that this plaintiff was on this train by permission of the negro porter, the porter was mistaken in supposing she had a right to ride upon the paper shown him by the plaintiff, and the duty of the conductor was to enforce the rules of the company and the supposed contract which the plaintiff thought she had; as the order on its face expressly provided that it was not good for transportation on trains, and would have been no protection whatever to the conductor if he had accepted it for transportation.

HOLDEN, J., delivered the opinion of the court.

Appellant, Betty Jones, appeals here from a judgment in favor of appellee in the circuit court of Monroe county, where she sued the appellee railway company for damages for being wrongfully ejected from one of its trains.

The record shows the following state of facts testified to in the court below: The appellant, Betty Jones, a negro woman, was in Prattville, Ala., a town on appellee's railway line, and desired to return to her home in Aberdeen, Miss. Her husband in Aberdeen purchased from the agent of appellee at Aberdeen a written order on the agent of appellee at Prattville, Ala., for a ticket for Betty from Prattville to Aberdeen. This order, which required Betty to call on the agent at Prattville and secure a ticket, was sent to her by her husband, and when she received it, being unable to read, thought it was a ticket, and she went to the depot and boarded a passenger train of the appellee for Aberdeen. Before getting on this train she showed this order, which she thought was a ticket, to the colored porter of the train, who was standing at the steps of the car where colored passengers get on, and was told by the porter, after he

had inspected the order, to get on the train. After the train started the conductor came through the train, collecting tickets, and this order was presented to him by the appellant, and he took it, and, after he had finished his other business of collecting tickets, he came back to the appellant and said: "What in the devil do you want to get on here with this thing?" And she replied: "It is sent from Aberdeen; it is a ticket." The conductor kept the order, and when the train was approaching Booth, a small station, the colored porter came into the car where appellant was riding and had her get off at this station. Neither the conductor nor the porter demanded that the appellant pay her fare or get off and secure a ticket. She says that she did not pay any money for passage; that the conductor did not ask for any. She was put off at this little station, where she suffered great inconvenience and discomfort, and had to remain there until the next day. She claims to have had nothing to eat nor water to drink, and suffered otherwise while there at Booth. With this state of facts before the lower court, a peremptory instruction was granted to the railroad company instructing the jury to find for the defendant.

The appellant assigns and urges two grounds for a reversal of the judgment of the lower court: First, that the appellee was guilty of negligence through its porter in permitting and inviting the appellant to get on the train after the porter had inspected the written order which appellant showed to him before she got on; second, that the appellee was guilty of negligence through its agent, the conductor, in wrongfully ejecting the appellant without first demanding her fare and giving her an opportunity to pay for passage after discovering that the written order was not good for transportation. We deem it necessary only to pass on the second proposition.

We have been unable to find any case in our state that expressly decides the point here involved, although

the case of *Railroad Co. v. Sanderson*, 99 Miss. 148, 54 So. 885, 46 L. R. A. (N. S.) 352, may be a point by inference. But in *Robson v. New York, etc., R. Co.*, 21 Hun (N. Y.) 387, it is held, in a case similar in its facts to the one here, that the conductor "exceeded his authority in putting the plaintiff off without demanding fare, and giving him an opportunity to pay it." This ruling is well sustained by other authorities, and we think that it is reasonable and sound.

This rule is particularly applicable to the case before us here, in view of the facts that the appellant was an ignorant negro woman, traveling alone, her ignorance and inexperience being necessarily apparent to the conductor, and she having gotten upon the train by mistake as to her ticket, and being a passenger thereon acting in good faith; and the conductor, under these circumstances, when he found that the written order, which, as exhibited in this record, looks very much like a railroad coupon ticket, could not be used for transportation, he should have done the reasonable and customary thing of demanding of Betty Jones that she pay her fare or get off and buy a ticket at the next station. The conductor did nothing of this sort, but, after having taken the written order from appellant, and using toward her certain language that is not generally considered exactly proper for a conductor to use toward a passenger, he kept the written order and took it away with him, and afterwards sent the porter in, who had appellant take her bundles and get off the train at a strange place, where she was compelled to undergo considerable discomfort and suffering.

We think that, under the facts and circumstances in this case, the appellant was a passenger acting in good faith, and was wrongfully ejected from the train, for which she had a right of recovery, and the lower court erred in granting the peremptory instruction for the appellee.

Reversed and remanded.

HALE ET AL. v. NEILSON ET AL.

[72 South. 1011.]

1. QUIETING TITLE. *Burden of proof. Wills. Estates created. Life estate. Constructions.*

Complainants filing a bill to remove cloud from title, bear the burden of their bill and must necessarily prevail upon the strength of their own title, and not upon the weakness of the title of their adversary.

2. WILLS. *Estate created. Life estate.*

Where by will a testator devised all of his estate to his wife so long as she remained his widow, but provided that if she married she should have one-half thereof during life and the remainder to her children, but, if there were no children then to the testator's relatives, and that if she married, one-half of the estate should immediately go to his same relatives. In such case the widow did not take a conditional fee, but at best a mere life estate and on her death without children her relatives took nothing.

3. WILLS. *Estates created. Life estates.*

Such will although it devised the remainder only on a condition which never happened to wit: the widow's remarriage, passed the estate on her death to the testator's relatives named in his wills.

4. WILLS. *Construction. Presumptions.*

Where every expression in the will manifests an intention on the part of a testator to dispose of all his estate, the presumption arises that he did not intend to die intestate as to any part of it, and his will if possible will be so construed.

APPEAL from the chancery court of Tallahatchie county.

HON. JOE MAY, Chancellor.

Bill by Mrs. Pearl Marks, Mrs. Mary Neilson and others, against C. H. Hale and others. From a decree overruling a demurrer to the bill, defendants appeal.

This cause originated in the chancery court of Tallahatchie county by bill exhibited by Mrs. Pearl Marks et al., appellees herein, against the appellants, seeking to remove an alleged cloud upon certain real estate

which appellees claim to have inherited from the widow of one C. A. Neilson, deceased. A demurrer was interposed to the bill and by the court overruled. From the decree overruling the demurrer, appellants, as defendants in the court below, prosecute this appeal.

Inasmuch as this case presents for construction the last will and testament of C. A. Neilson, we here set out in full the will, with codicil, which is in the following language:

"I, Charles A. Neilson, a citizen of the county of Tallahatchie, state of Mississippi, being of sound disposing mind and memory and more than twenty-one years of age, do hereby make, ordain, publish and declare this my last will and testament hereby revoking all others heretofore made by me.

"Item 1. It is my desire that all my just debts and funeral expenses be paid as soon after my death as practicable.

"Item 2. I devise and bequeath all of my estate, both real and personal to my beloved wife, to have, to hold and enjoy the same as long as she continues my widow.

"Item 3. It is my will and I so direct that in the event of the marriage of my widow, that she retain to her own separate use, benefit and behoof, one-half of my said estate, both real and personal, during her natural life, and upon her death, should she leave surviving her any child, or children or descendants of them, I devise and bequeath to such child or children or descendants of them the said half so to be retained by my wife during her natural life, but should she die not leaving any child or children or descendants of them I bequeath and devise said last mentioned half to the persons hereinafter mentioned in the 4th item of this will, to be divided among them in the proportion therein provided for the division of said half to be given up by my wife upon marriage as aforesaid.

"Item 4. In the event of the marriage of my widow, I devise and bequeath one-half of my estate, both real

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and personal, to the following persons, in the following proportions, to wit, one-fifth of said half each to my sisters, Annie F. Symons and Catherine C. Hopkins, my niece, Annie Little, my nephew, Walker Neilson; and one-tenth of said half each to my nephews, William Covington and Benjamin Covington, to have and to hold unto themselves and their respective heirs in fee simple.

“Item 5. It is the full meaning and intent of this my last will and testament that my beloved wife shall hold and enjoy all of my estate during her widowhood, in case she marries, that one-half of my estate be divided and disposed of among my said sisters, niece, and nephews as specified and directed in item 4 of this will; that my wife retain during her natural life the other half of my estate, and that in case my wife die leaving a child or children or their descendants surviving her, the last mentioned half of my estate shall be divided between my said sisters, niece, and nephews in the same manner and proportions as directed in said item 4 of this will for the division of said half so to be given up by my wife in case of her marriage.

“Item 6. I hereby nominate, constitute and appoint my beloved wife, Julia A. Neilson, the executrix of this my last will and testament and I hereby expressly direct that she be not required to execute any bond as such executrix and that she be not required to execute any bond for the preservation of said estate or any part of it.

“Signed, sealed, published, and declared this the 31st day of March, 1879.

“[Signed] C. A. NEILSON. [Seal.]

“The above and foregoing last will and testament of Charles A. Neilson was this day signed, sealed, published, and declared by the said Charles A. Neilson to be his last will and testament in our presence and each of us signed the same as witnesses at the request of said

Charles A. Neilson in his presence and in the presence of each other.

"This the 31st day of March, A. D. 1879.

"JAMES McCLAIN.

"U. B. MITCHELL.

"W. C. MITCHELL.

"This codocil made in addition to and in modification of my last will and testament dated 31st day of March, 1879.

"Item First. I will and bequeath to John W. Johnson, a minor, living with me my black mare named Mollie, and her two colts, named Sallie and Dewdrop, and their future offspring, also my cow named Mattie and calf and their future offspring, also Crowder cows, half Holstein heifer and her future offspring.

"Item Second. It is further my will and I so direct that said John W. Johnson take of my estate equally with my brothers and sisters, that is to say, he and they are to have my estate, share and share alike as provided in my said last will for my brothers and sisters, except that the said John W. Johnson is not to share in any of my stock except as provided in the first item of this codicil.

"Item Third. It is further my will and I so direct that if said John W. Johnson die before he arrive at the age of twenty-one years, the provisions made for him above in this codicil shall be divided equally between my half-brothers and sisters, to-wit: James C. Neilson, Sallie D. Neilson, John A. Neilson, Sophia A. Neilson (now Mrs. Sophia A. Lewis) they to share and share alike.

"I also give to my wife, Julia A. Neilson, in addition to the provision made in my will Mag's heifer, Callie and Laura and their future offsprings and one mare Zana and her future offsprings. [Signed] C. A. NEILSON.

"Witness: GEORGE G. HARVEY.

"WILLIAM R. HENSON.

"W. D. WATSON."

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Statement of the case.

Mr. Neilson died in 1907, leaving his widow, Mrs. Julia A. Neilson, as a devisee and one of the chief beneficiaries of his estate, and, had there been no will, his said widow would be his sole heir at law. Mrs. Julia Nielson died intestate in the year 1913, leaving appellees as her sole heirs at law. The complainants in this case, then, are the blood relatives of the widow and exhibit this bill against the other devisees named in the will of Mr. Neilson, challenging their right, title, and interest in any of the lands devised. There are two contentions or views pressed by counsel for complainants: First, that the testator devised his widow the fee in these lands subject to be divested, however, upon her remarriage; second, that if the testator did not devise a conditional fee to his wife, he did bestow a life estate conditioned to be divested upon remarriage. to the extent and in the way expressly provided in the will; and that as to the remainder he died intestate, leaving his widow as sole heir, and, since she did not remarry, both the life estate and remainder were merged in her. The widow in fact did not remarry. There is another, and what might be termed a third, contention that, conceding that the testator made an attempt to dispose of the remainder, the language employed by him was and is ineffectual as disposing of the fee, and accordingly this fee is cast by our laws of descent upon the widow.

It is the contention of appellants that the widow took at best a life estate subject to be limited as to one-half by remarriage; that the widow took an estate *durant viduitate*; that the will as a whole gives evidence of a clear intention to regard the brothers and sisters of the testator and John W. Johnson, the minor living with him, as objects of his bounty and devisees as to the remainder in fee; that, the life estate of the widow having now determined, the devisees, blood relatives of the testator and not the blood relatives of the widow, are now the absolute owners of the subject of this litigation; and that, even if they are not named as devisees express-

ly upon the death of the widow, they are certainly devisees by necessary implication.

Frierson & Hale, Dinkins & Caldwell, for appellant.

Julian C. Wilson, Wm. Baldwin and Woods & Kuykendall, for appellee.

STEVENS, J., delivered the opinion of the court.

The complainants in the court below, bearing the burden of their bill, must necessarily prevail upon the strength of their own title, and not upon the weakness of the title of their adversary. To maintain this suit they must be regarded as having inherited the lands in question from Mrs. Julia A. Neilson, the widow of the testator, whose will is here brought under review. Did then Mrs. Julia A. Neilson own an estate of inheritance. We think not. Before entering the mystic maze of authorities on wills similar to the one in question, we read this will from first to last in an endeavor to find and to appreciate the intent and purpose of the testator, to gather from the whole will what he meant to say and do. Looking to the whole instrument, including the codicil, and giving due regard to every expression, we are convinced beyond doubt that Mr. Neilson intended to give his wife the full use and enjoyment of his estate so long as she remained his widow, and that is to say, so long as she remained unmarried, and, at most, for her natural life. So long as she bore the name of Neilson she was to enjoy the estate of Neilson, but at all times her estate was a qualified and limited estate. If she should remarry, then it is clear from the express language of the will that her life estate in the whole was cut down to a life estate in one-half. The will as a whole convinces us that the testator regarded his brothers and sisters, close blood relatives of his, as objects of his bounty; and the codicil shows clearly that the minor, who was living with him as a member of his household,

was to be the recipient of his gracious favor. Mr. Neilson was evidently attempting to dispose of his entire estate; he thought he was effectually doing so. He had no children. If he provided for his beloved wife during the balance of her natural life, he evidently felt that he would be discharging toward her his full moral and legal obligations. She was, accordingly, to have the full and unrestricted use and enjoyment of his estate so long as she remained unmarried, but upon remarrying, and thereby acquiring a new and independent source of income, her life estate would be cut down. If she did not remarry, she was to use the entire property until her death. And from a practical and business viewpoint, what higher estate can one have in a plantation than the full and complete use, the entire usufruct, for one's natural life? The only additional privileges would be the right of devising or passing on the title to others, and in this case would mean the right of the widow to bestow the title upon those who were not regarded by the testator as special objects of his favor and bounty. There is some conflict in the authorities, but the weight of authority fully sustains the view that the widow in this case did not take a conditional fee, but at best a mere life estate. These authorities are sufficiently referred to in the briefs of counsel; most of them are collated in the note to *Fidelity Trust Co. v. Bobloski* (Pa.), 28 L. R. A. (N. S.) 1099.

In so holding, we are not unmindful of our statute, but this view is in full accord with previous expressions of our own court, and the disposition of our own cases to look to the entire will and give effect, if possible, to every clause therein. See *Selig v. Trost et al.*, 70 So. 699. In the early case of *Pringle v. Dunkley*, 14 Smedes & M. 16, 53 Am. Dec. 110, our court, by Chief Justice SHARKEY, interpreted the words "so long as the said Elizabeth shall continue my widow," and reached the conclusion that:

"This is strictly a limitation, a gift to the wife during her widowhood, and such limitations have been uniformly sustained as valid."

It is stated in the note to *Maddox v. Yoe* (Md.), Ann. Cas. 1915B, 1238, that:

"According to the weight of authority a devise to a person so long as he or she remains unmarried, with the limitation over in the case of marriage, gives, in the absence of language clearly indicating a contrary intent, a determinable life estate"—citing abundant authorities.

There are many adjudicated cases holding that the expressions "so long as she remains my widow" "while she remains my widow," and "during widowhood," manifest an intention to create a life estate subject to be defeated by remarriage when the will so provides. The first impression, then, which we get, and which we think any layman would get from reading the will as a whole, to the effect that the widow's estate in this instance is a life estate, is fully in accord with the authorities, and we accordingly hold with confidence that Mrs. Neilson took under the will an estate which would not pass by inheritance to her heirs.

Our interpretation of this will is strengthened by the last clause of the codicil where the testator says, "I also give to my wife, Julia A. Neilson, in addition to the provisions made in my will," certain live stock specifically mentioned. This indicates that the testator regarded "the provisions" in the will as not carrying the entire fee, but a qualified interest.

It is argued, however, and that with some degree of persuasion, that the devise of the remainder was by the express provisions of the will made to depend upon a contingency that never happened, to wit, the remarriage of the widow; that, the contingency not having arisen, the remainder in fee was not effectually devolved by the will but as to it the testator died intestate.

If we should be governed by the literal terms of the

will, this view might obtain; but looking again to the whole will, the relation of the parties one to another, the purposes to be accomplished, and, as it were, the setting of this important and solemn act of the testator, we are again convinced that the will devolves title upon appellants, or, at least some of them, and that Mr. Neilson did not intend to, and did not in fact, die intestate as to any portion of this property. Every expression in this will manifests an intention to dispose of all the estate. The testator says himself, "all of my estate both real and personal," and when this language is employed in the introductory clause of a will Mr. Underhill (volume 1, p. 617) says that:

"The presumption arises that, having the disposition of his whole estate in view, he did not intend to die intestate as to any part of it. If his subsequent language may be construed in either of two ways, by one of which a complete disposition will be made of his whole estate, and by the other only a partial disposition will be made, resulting in a partial intestacy, the introductory statement, pointing to a complete disposition, ought to be considered, and that sense adopted which will result in a disposition of the whole estate."

It is true that the language employed in the will does not expressly declare that the devisees in favor of appellants were to take effect upon the death of the widow, but there is a clear and unmistakable devise over on the marriage of the widow. This brings the case within a well-recognized class of cases discussed by Mr. Jarman and Mr. Underhill in their splendid works on wills, and simply adds another to the long line of cases construing similar provisions and holding that the devisee in remainder takes the estate. As stated by Underhill (volume 1, p. 625):

"A devise by the testator to his widow for the term of her natural life, but if she should marry again, then in fee to A., without any provision for the disposition of the fee after her death in case she should not marry

again, is a very good form of disposition. In such cases the court will insert the words, 'when she dies' or 'after her death,' and A. will take a vested remainder by implication upon the death of the widow, without having remarried."

Mr. Jarman, in discussing the rule that where the prior estate takes effect but is determined in a different manner from that expressed by the testator, the ulterior gift fails, proceeds, however, to state:

"An exception to this rule, however, may seem to exist in a case which deserves especial attention, on account of the frequency of its occurrence, namely, where a testator makes a devise to his widow for life, if she shall so long continue a widow, and if she shall marry, then over; in which the established construction is that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect, at all events, on the determination of her estate, whether by marriage or death.

"In *Luxford v. Cheeke*, 3 Levinz, 125 (c), which is a leading authority for this doctrine, the testator devised to his wife for life, if she should not marry again, but if she did, then that his son H. should presently after his mother's marriage enjoy the premises, to him and the heirs of his body, with remainders over. The widow died without marrying again; but it was held, that the remainder took effect.

"*Gordon v. Adolphus*, 3 Brown's P. C. Toml. 306, was a case of the same kind. The bequest was to the testator's wife 'during her natural life, that is to say, so long as she shall continue unmarried; but in case she shall choose to marry, then and in that case' it was to be for the immediate use of the testator's daughter, and in case she should die without leaving issue, then over; and it was considered by Lord Camden, and afterwards in the House of Lords, that the bequest over was not contingent on the event of the marriage of the wife.

"In these cases, therefore, the widow takes an estate *durante viduitate*, and the gifts over are vested remainders absolutely expectant on that estate, being to take effect, at all events on its determination, and not conditional limitations dependent on the contingent determination of a prior estate for life."

He further states the general conclusion as follows:

"On the whole, then, the distinction would seem to be that, where the circumstance of not marrying again is interwoven into the original gift, the testator, having thus, in the first instance, created an estate *durante viduitate*, must generally be considered, when he subsequently refers to the marriage, to describe the determination by any means of that estate, and, consequently, the gift over is a vested remainder expectant thereon."

This doctrine is discussed in a convincing fashion by BURKE, J., in the recent case of *Maddox v. Yoe, supra*, and the authorities there quoted demonstrate the soundness of this view. This rule is not the product of to-day, or even of American jurisprudence. It is the rule in England as well as America, and the principle applied was long ago carefully thought out and enforced by distinguished jurists in England and properly followed by our American courts. The enforcement of this rule simply gives expression to the evident intent of the testator. Our court had occasion to discuss devises by implication in *Ball v. Phelan*, 94 Miss. 293, 49 So. 956, 23 L. R. A. (N. S.) 895, and the opinion of Judge WHITFIELD in that case reviews many cases where a devise by implication has been declared. It seems that this situation has arisen more frequently in reference to wills in which a husband makes a provision for his wife during widowhood with devises over in the event she remarries. The remarriage is the first contingency provided for and the one especially in the mind of the draftsman of the will. This contingency must necessarily arise before the death of the widow, and so it is that the mind of the testator or draftsman is directed to

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[112 Miss.]

that event which must of necessity come first in point of time. Each will, of course, must be construed according to its own peculiar wording, and a slight difference in the penning might indicate a different intention on the part of the testator. Taking the whole language employed in the instant case, we have no doubt about the intention of the testator here to regard appellants as the ultimate objects of his bounty. The testator in this case is so certain that the devise in remainder will some day be theirs that he even undertakes to make disposition of that portion of the estate devised to John W. Johnson in the event this minor should die before he reached the age of maturity. The language of the codicil is especially positive and far-reaching.

There is no occasion for us now to decide just who are the beneficiaries of this remainder. No issue of this kind is here properly made or presented. In our judgment appellees did not inherit this land from Mrs. Neilson, and under this view the demurrer to the bill should have been sustained. It follows that the decree of the chancellor must be reversed, the demurrer sustained, and the bill dismissed, without prejudice to the right of appellees to request that the case be remanded for the purpose of having the bill amended, if they so desire.

Reversed, and decree here for appellants.

Reversed.

SOUTHERN RY. CO. v. NORTON.

[73 South. 1.]

COMMERCE. *Interstate commerce. State police regulations. Separation of races. Constitutional law. Due process of law.*

Our state statute requiring railroads to provide equal but separate pullman accommodations for the white and colored races by providing two or more cars for each train or by dividing the cars

so as to secure separate accommodations, where the number of negro passengers in pullman cars is so small as to be negligible, and where the expense of installing accommodations for the two races would be large, is valid as a reasonable police regulation of the state, is not confiscatory and is not a taking of property without due process of law, and it may be enforced as to both intrastate and interstate passengers, regardless of the additional expense imposed upon the common carrier in complying with it.

APPEAL from the circuit court of Washington county.
HON, F. E. EVERETT, Judge.

Suit by Mary L. Norton against the Southern Railway Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Percy & Percy, for appellant.

Percy Bell, for appellee.

HOLDEN, J., delivered the opinion of the court.

The appellee, Mary L. Norton, recovered a judgment for one thousand dollars against the appellant Southern Railway Company, as actual and punitive damages in the circuit court of Washington county, from which judgment this appeal is taken here.

The judgment of the lower court is founded upon the following undisputed facts: The appellee, Mary L. Norton, a white woman, boarded what is known as the "Memphis Special" train at Philadelphia, Pa., and traveled from that point to Memphis, Tenn., in a Pullman sleeping car. In the same Pullman car there was a negro passenger, who had boarded the train at New York and whose destination was Memphis, Tenn. The appellee found traveling in the same coach with a negro unpleasant, and expressed her indignation and objection to the conductor. No complaint was made of any special indignity suffered by her, and no rudeness was

exhibited on the part of the conductor; the complaint being simply that she was compelled to ride in the same car with the negro, which was disagreeable and unpleasant to her, and in violation of the statute law of some of the states through which the train passed. The Memphis Special train, upon which appellee and the negro were riding, passes through the states of Pennsylvania, Delaware, Maryland, West Virginia, Tennessee, Alabama, and Mississippi, and ends its trip at Memphis, Tenn. Between New York and Washington the Memphis Special runs over the tracks of the Pennsylvania Railroad; between Washington and Memphis it runs over the tracks of the Southern Railway, except between Lynchburg, Va., and Bristol, Tenn., where it runs on the tracks of the Norfolk & Western Railroad. At the point where the appellee embarked on the Memphis Special (Philadelphia) and at the point where the negro passenger embarked (New York City), there were no statutes in force and no rules of the railroad company requiring the separation of the white and colored races, but such statutes are in force in the states of Virginia, Tennessee, Alabama, and Mississippi. These statutes are practically all in the phrasing of the Tennessee statute, which reads in part as follows:

“All railroads carrying passengers in the state other than street railroads shall provide equal but separate accommodations for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations.”

Such a statute is in force in every state through which the Southern Railway passes, except the states of Illinois and Indiana. The appellee sued the appellant for actual and punitive damages suffered by her because the negro passenger was allowed, over her protest, to ride in the same Pullman coach with her, as stated above. A peremptory instruction was granted to her by the lower court, allowing both punitive and

actual damages, and the jury awarded her a verdict for \$1,000. The defendant in the court below, in order to exculpate itself from liability, submitted proof that only one out of every five hundred Pullman passengers is a negro, and further proved, in detail, the additional expense which would be suffered by it and the other railroads through states having race separation statutes, if such railroads were required to furnish either separate Pullman coaches for the races, or Pullman coaches with separate compartments for the races.

The appellant presents here for our consideration two Federal questions: First, when the expense of installing such separate accommodations for the races is large, and when the number of negro passengers in Pullman coaches is so small as to be negligible, is a state statute, requiring in interstate, as well as intra-state, commerce separate Pullman accommodations for the races valid as a reasonable police regulation, although it is a burden on interstate commerce? Second, is not such a statute, under such circumstances, confiscatory? Enforced, is it not a taking of property without due process of law?

The question of the validity of the statutes requiring the separation of races on passenger cars in those states which have such statutes was presented and passed upon by the supreme court of Tennessee in *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432, the court in that case holding that the statute was valid as a reasonable exercise of the police power of the state, enacted for the security of peace and good order, and in the interest of the public welfare, and that, it being a valid police regulation of the state, it applies to both *intra* and *inter* state travel, even though its enforcement imposed an additional expense and burden upon interstate commerce.

The two questions presented here by the appellant were also decided by this court in *Alabama & Vicksburg Railroad Co. v. Pearl Morris*, 103 Miss. 511, 60

So. 11, Ann. Cas. 1915B, 613, holding that the race separation statute here in question was intended to apply to sleeping cars, as well as all other passenger cars composing the trains of common carriers. This court also held in that case that the statute is a reasonable constitutional exercise of the police power of the state, and is valid, and applies to both intrastate and interstate passengers; that the statute was enacted to promote peace, comfort, and general welfare of the public; and, even though its enforcement will be a burden upon interstate commerce and necessarily imposes an additional expense upon the carrier, it is not for these reasons void, but is within the Constitution, and is valid as a reasonable regulation under the police power of the state.

Following the views expressed by the courts in the two cases cited above, which we think are sound, we hold that the race separation statute, here in question, is valid as a reasonable police regulation of the state, is not confiscatory, and is not a taking of property without due process of law, and that it may be enforced as to both intrastate and interstate passengers regardless of the additional expense imposed upon the common carrier in complying with it. The judgment of the lower court is affirmed.

Affirmed.

SAUCIER v. ROSS.

[73 South. 49.]

1. PHYSICIANS AND SURGEONS. *Negligence. Action for negligence. Defense. Evidence. Admissibility.*

Unexplained, the leaving of a four inch rubber tube in a patient's body by a physician until the wound healed over was negligence in the treatment of his patient.

112 Miss.]

Brief for appellant.

2. SAME.

In such case it was no answer to the patient's suit for damages, that the rubber tube may have been left in plaintiff's wound by an attendant nurse or another physician in the hospital, where the defendant was her physician and operated on her and attended her while in the hospital and the other physicians were acting under defendant's directions in the treatment of her and defendant discharged her from the hospital at the time she left.

2. SAME.

In such case the fact that plaintiff and her husband after the discovery that the rubber tube had been left in her body telegraphed defendant their good wishes and sent him a christmas card, should not have been admitted in evidence, since such fact does not tend to show that the plaintiff's version of her troubles was not true nor does such a courtesy show a condonation of her grievance.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Suit by Mrs. E. T. Saucier against Dr. T. E. Ross.

From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Mize & Mize and *Money & Brown*, for appellant.

In the case of *Davis v. Kerr*, 239 Pa. 86, Atl. 1007, 46 L. R. A. (N. S.) 611, a case on all-fours with the instant case, and with all the authorities collated in the note of L. R. A., it was held: 1. Surgeons cannot relieve themselves from liability for injury to a patient by leaving a sponge in the wound after an operation, by adoption of a rule requiring the attending nurse to count the sponges used and removed, and relying upon such count as conclusive that all sponges have been accounted for. 2. The burden of showing care is upon a surgeon who leaves a sponge inclosed in a wound after the performance of an operation.

Ruth v. Johnson, 96 C. C. A. 643, 172 Fed. 191, where a surgeon was held liable for injuries resulting from his leaving a gauze sponge in the abdominal cavity of the

patient. Practically all of the cases we have been able to find on this subject are collated in the note to *Davis v. Kerr, supra*. *Samuels v. Willis*, a Kentucky case reported in 19 Am. & Eng. Ann. Cases, p. 188, and very instructive note thereto, is a case where the facts are practically the same as in the case at bar; and we especially invite the court's attention to the case and the note appended thereto.

The court also admitted in evidence a telegram sent by appellant's husband to Dr. Ross, and a Christmas card, sent by appellant to Dr. Ross, after the tube had been removed by Dr. Ross, the appellant having objected to the admission of same. This was clearly incompetent. While it does not amount to anything if the case is affirmed, yet, if it should be reversed, we hope the court will pass on it, as on what theory the court admitted it we cannot see.

Any casual inspection of the record will show that every ruling of the court was hostile to appellant. The appellee was very fortunate in the record throughout. Not only did he receive a peremptory instruction but all the court's rulings were in his favor. The record will disclose that several instances occurred where the appellee would make objection to a perfectly competent question of appellant and the court would observe: "It is objectionable, but I will let him answer it." Of course the court, if the question was objectionable, should have sustained the objection, yet he let the question be answered with the string to it that it was objectionable. We cannot see on what theory in the world the telegram record and the Christmas card record were admitted in evidence.

In conclusion, we say that this was a question for the jury to determine, as to whether or not Dr. Ross negligently left the tube and gauze in plaintiff. As this is a case where a peremptory instruction was given for the appellee, all appellant's evidence is to be taken as true

together with all reasonable deductions therefrom in her favor.

We would also cite the court to the case of *Richardson v. Dumas*, 64 So. 459, a Mississippi case, holding that the owner of a private hospital is liable for the acts of his employees; so, if Dr. Ross or any of his employees left the tube in appellant, he is liable therefor.

Tally & Mayson, for appellee.

We submit that the question as to when and how this drainage tube happened to be left in this wound was purely conjectural. Sure it is that the proof positively shows that the gauze taken out of this wound was not the kind of gauze used at the hospitals, but homemade gauze; and we understand that it is common knowledge that when a drainage tube is inserted that there is usually gauze placed over it and pinned to it with a safety pin to prevent it from going too deep in the incision, and that those tubes are changed from day to day and time to time until the wound gets well or ceases to separate, and when we go into the field of conjecture, we can only reach through our imagination one result—that some of the doctors handling her after she went home, or some of the nurses who left the patient without instructing the nurse who came after her as to what she had done, failed to securely fasten this drainage tube and the other nurse negligently and improperly cleaned the wound, and therefore, did not find it and permitted the flesh to grow up around it and practically closed over it and hence the long trouble and long delay in finding the tube.

The little courtesies that it appears in this record, and the special interest taken by the appellant and her husband in Dr. Ross, the surgeon who had no doubt saved her life, clearly indicate that this suit was an afterthought, and that for several years it never entered her mind that Dr. Ross was to blame for this tube being left in her

Brief for appellee.

[112 Miss.]

side; and hence the lateness in the filing of this suit. And they are still confronted at every step and turn in the case with the language of the physician when he extracted it from her side and showed her what he had found, when she then and there sought to saddle the blame on somebody, that he merely said: "There are so many fingers in the pie that we cannot say who is to blame." And we submit that this same condition confronted the learned court below when he gave the peremptory instruction for the appellee; they had not satisfied the court by proof that Dr. Ross was to blame, and hence the court did what he ought to have done—peremptorily instructed the jury to return a verdict in favor of the defendant.

Alexander & Alexander and S. E. Travis, for appellee.

It is perfectly apparent in the light of the real case in hand that none of the authorities cited and relied on by counsel for appellant shed any light upon the questions for determination. The first case they cite, *Davis v. Kerr*, 46 L. R. A. (N. S.), 611, is manifestly the basis for the declaration, especially for the allegation therein confining the complaint to the day of the operation and to the specific pieces of tube and gauze then used, and is doubtless responsible for appellant's proofless cause. In that case, Mrs. Davis was operated on by her surgeon, Dr. Kerr, at a hospital mutually agreeable to the parties. The diseased part was reached through an incision into the abdominal cavity which had to be large enough to admit of the hand of the operator. In every such operation, pads or sponges have to be introduced into the abdominal cavity through the opening to take up the secretions, and separate the wall of the intestines from the field of the operation, etc. These pads or sponges were all supposed to be removed before closing up the incision. The nurses, by the custom prevailing at the hospital, were required to keep an accurate count of the pads or sponges used. The surgeon, at the conclusion of the operation,

relied on the nurse's count, closed up the incision, and one of the sponges was by reason of the nurse's miscount left in the wound for some months and had to be removed by a second operation. The surgeon defended on the theory that, while he had left the sponge in the wound, he had depended on and was misled by the nurse's count, and that, therefore, the nurse alone was at fault. The court's decision was based upon rulings of the lower court and was to the effect that where the surgeon admitted leaving the sponge in the wound under such circumstances, it was for the jury to say whether or not he had discharged his whole duty to his patient by simply relying on the nurse's count. In other words, the question was not as to who left the sponge in the wound, but whether the surgeon who admitted the fact was negligent in accepting the nurse's count under the particular circumstances of that case.

Now, if the appellee had admitted, or the proof had shown that the specific pieces of tube and packing found in the wound were left there by the appellee on the day of the operation in November, 1910, as alleged, and that they remained there until December, 1912, as alleged, then this Kerr case would be somewhat analogous to the one at bar, but the very opposite is the truth as the appellant herself testified and the case therefore, has not the remotest bearing on the inquiry before the court.

The case of *Ruth v. Johnson*, 177 Fed. 191, is wholly inapplicable. The sole question there was whether the surgeon sewed up the wound of his patient after the operation, leaving in the abdominal cavity a pad of gauze some nine and one-half by eleven and one-half inches. We presume no one would dispute that such state of facts unexplained would amount to negligence. The court held that the testimony was sufficient to carry the case to the jury on that point. The appellant here alleges a somewhat similar case, but overturned it by her own testi-

mony, and the case, therefore, lends no support to counsel's contention.

The same may be said of the case of *Samuels v. Willis*, 19 American & English Annotated Cases, 188. There was testimony to support the allegation in the complaint to the effect that the surgeon sewed up the gauze in the wound on the day of the operation, and the court held that it was for the jury to say whether or not such act constituted negligence in that case. The following is quoted from the note to said *Samuels* case, so confidently relied on by counsel and by which their theories are exploded:

"In *Humiston v. Palmer*, decided Dec. 19, 1910, in the Ohio circuit court, eighth circuit, it was held that the chief surgeon was not liable for the negligence of persons assisting in an operation, resulting in a sponge being left in the abdominal cavity, where such assistants were furnished to the patient by the hospital at which the operation took place, though they were, during the operation, necessarily required to obey the orders of the chief surgeon. And in *Harris v. Fall*, 177 Fed. 79, 100 C. C. A. 497, 27 L. R. A. (N. S.), 1174, it was also held that the chief surgeon was not necessarily liable after properly performing an operation, for a gauze swab being left in the body of the patient, through the negligence of employees of the hospital furnished to the plaintiff. In that case the court quoted with approval from *Akridge v. Noble*, *supra*. 19 Am. & Eng. Ann. Cases, 191.

Counsel finally cite the case of *Richardson v. Dumas*, 64 So. 459, holding that the owner or proprietor of a private hospital, operated for profit, which is not charitable, is liable in damages for the negligence of his employees. The case at bar contains no such issue. There is no proof that any of the employees of the hospital left the tube or gauze in the wound, and there is no proof to the effect that the appellee either owned or was employed by the hospital. So, as will be seen, none of the cases

cited by counsel support in the least their contention. The cases all relate to foreign substances sewed up in the wounds at the time of the operations under consideration, while, in the case at bar, the proof shows that the tube and packing complained of in the declaration were promptly removed from the wound.

The conclusion is therefore inevitable, in the light of the law relied on by opposing counsel as well as of the law applying to the case in hand, that the action of the trial court complained of is correct in matter of law as well as in matter of fact.

POTTER, J., delivered the opinion of the court.

This is a suit brought by Mrs. E. T. Saucier against Dr. T. E. Ross, in the circuit court of Forest county, upon allegations in the declaration that the defendant had been negligent in an operation on appellant for an abscess, and the subsequent treatment.

The gravamen of the plaintiff's suit is that the defendant had left certain foreign substances in her body, after the operation, for such length of time that her wounds partially healed, covering up the said foreign substances, alleged to have been a rubber drainage tube, about four inches long and one-quarter of an inch in diameter, and gauze packing used about the operation.

The plaintiff swore Dr. Ross was her physician at the time the operation in question was performed; that he performed the operation, attended her from time to time while she was in the hospital, and finally discharged and sent her home; that Dr. Ross had put a rubber tube in her wound; that he was the only doctor who had done this; that he had charge of the case, and that he had left the rubber tube in her wound, and that the flesh had grown over same; and that after this rubber tube had been in her side for nearly two years, she again went to Dr. Ross, who cut same out, and upon being charged by Mrs. Saucier with having left the rubber tube in her, he made no denial. The testimony rather tended to show

that gauze which came out of her wound was not the same gauze put there by Dr. Ross, but gauze which had been used after the patient reached her home. The testimony shows that so long as the rubber tube was in her body, the wound in her abdomen caused by the operation would not yield to treatment, and that she suffered severely therefrom. The testimony further shows that when the rubber tube was removed from her body, the wound healed up promptly. In addition to this, the testimony for the plaintiff shows that she spent large sums of money for doctor's bills, and otherwise, in the treatment of this wound.

Upon motion, the trial judge excluded the plaintiff's testimony. This was error. Unexplained, the leaving of a four-inch rubber tube in a patient's body by a physician is negligence, and it occurs to us that it would be very difficult for a physician to explain how he could leave a rubber tube in a patient's body, until the wound healed over same, and not be guilty of negligence in the treatment of his patient.

It is no answer to plaintiff's suit that the rubber tube may have been left in her wound by an attendant nurse or another physician in the hospital. She testified that Dr. Ross was her physician and operated on her and attended her while in the hospital, and that the other physicians were acting under his directions in the treatment of her, and that he discharged her from the hospital at the time she left.

On cross-examination of the plaintiff, the defendant was permitted, over objection, to introduce in evidence a telegram of good wishes and a Christmas card from the plaintiff and her husband to Dr. Ross, sent after the discovery of the rubber tube in her body. This testimony was incompetent and should have been excluded. It does not tend to show that the plaintiff's version of her troubles is not true, nor would any such courtesies show a condonation of her grievances.

Reversed and remanded.

CARUTHERS-JONES SHOE CO. v. CHICKASAW COUNTY BANK.

[73 South. 49.]

GARNISHMENT. Contested answer. Attorney's fee. Statute.

Under section 2361, Code 1906, which provides that "A garnishee shall be allowed for his attendance, provided he shall put in his answer within the time prescribed by law, the pay and mileage of a juror, and in exceptional cases rendering it proper, the court may allow the garnishee reasonable compensation additional to the foregoing" etc., a garnishee will not be allowed attorney fees for defending his answer when contested and where he fails to put in his answer in time will be allowed no compensation whatever.

APPEAL from the circuit court of Chickasaw county.
HON. H. K. MAHON, Judge.

Garnishment proceeding by the Caruthers Shoe Company against the Chickasaw County Bank. From a judgment dismissing the garnishee, with a judgment against the company with attorney fees, it appeals.

The facts are fully stated in the opinion of the court.

Joe H. Ford, for appellant.

C. H. Moffat and *A. T. Stovall*, for appellee.

HOLDEN, J., delivered the opinion of the court.

From a judgment in favor of appellee, Chickasaw County Bank, in the circuit court of Chickasaw county, appellant appeals to this court. The controversy in the court below, stated briefly, is founded on the following facts: The appellant had an enrolled judgment against W. A. Tabb, who was employed as cashier of the appellee bank. Appellant had a writ of garnishment issued against the appellee bank, commanding it to answer on a certain day as to whether or not it was indebted to the said Tabb, cashier. Appellee filed

its answer, denying any indebtedness. The answer was regular in all respects, but it was not filed "within the time prescribed by law." However, after the answer was filed the appellant appeared by counsel and objected and excepted to the answer of the garnishee, and proceeded to contest the truthfulness of it, all of which was done in good faith by the appellant. The court, after hearing the objections and the contest to the answer, rendered judgment dismissing the garnishee and adjudging the sum of seventy-five dollars as attorneys' fees against the appellant. The appellant, excepting to this action of the lower court, appeals here and contends that the circuit judge erred in giving judgment for seventy-five dollars against the appellant, for the reason that no attorneys' fees can be recovered in this case.

We do not think that section 2361, Code of 1906, grants authority to the judge to allow attorneys' fees to the garnishee for defending his answer in cases where the answer of the garnishee is objected to and contested by the plaintiff in garnishment; and it is so held in *Bernheim Bros. & Uri v. Brogan*, 66 Miss. 184, 6 So. 649. While the statute provides that:

"The garnishee shall be allowed for his attendance, . . . provided he shall put in his answer within the time prescribed by law, the pay and mileage of a juror, and in exceptional cases rendering it proper, the court may allow the garnishee reasonable compensation additional to the foregoing," etc.—we do not think that the appellee bank can be allowed any compensation or fee whatever in this case; for it appears, undisputed, that the bank failed to "put in (its) answer within the time prescribed by law." Consequently, the appellee was not entitled to be allowed the pay and mileage of a juror; and if he could not be allowed the pay and mileage of a juror, under the statute, he could not be allowed any other compensation, even though it be an exceptional case rendering it proper, because the compensation in exceptional cases is only allowed in addition to the pay

and mileage of a juror, when his answer is filed within the time prescribed by law. A right to an allowance in the first instance must exist before any "additional" compensation can be allowed.

The judgment of the lower court is reversed, and judgment entered here for appellant.

Reversed.

GARNER v. STATE.

[73 South. 50.]

1. *HOMICIDE. Insanity. Evidence. Criminal law. Capacity. Passion.*

In a trial for homicide evidence for defendant to prove his insanity should be excluded where, at most, it only tends to prove that defendant was probably excentric, passionate and excitable and where such evidence would not cause any reasonable man to doubt his sanity.

2. *SAME.*

Mere frenzy or ungovernable passion is not insanity within the meaning of the law, sufficient to excuse crime.

APPEAL from the circuit court of Tunica county.

HON. W. A. ALCORN, Jr., Judge.

L. C. Garner was convicted of murder and appeals. The facts are fully stated in the opinion of the court. *Montgomery & Montgomery*, for appellant.

Ross A. Collins, Attorney-General, and *Cutrer & Johnston*, for appellee.

• COOK, P. J., delivered the opinion of the court.

The evidence in this case establishes, to the exclusion of all reasonable doubt, that the appellant was guilty of murder, unless the evidence offered in his defense

raises a reasonable doubt of his sanity at the time he committed the homicide. All of the evidence to support the theory of insanity was excluded by the trial judge.

We have carefully read the evidence given by all of the witnesses touching the alleged mental incapacity of appellant, and believe that it was properly excluded. At the most, this evidence tends to prove that defendant was probably eccentric, passionate, and excitable, but it is clear to us that no evidence was produced which would cause any reasonable man to doubt his sanity.

The motive and the reason for the homicide is perfectly clear. The defendant believed that the deceased had circulated reports calculated to destroy the reputation of his sister, and, so believing, he took the law in his own hands, and slew her traducer.

It is not for us to say whether or not the deceased did, in fact, circulate the slanderous reports, but we are justified in saying that appellant believed that he did, and acted deliberately when he fired the fatal shot. Mere frenzy or ungovernable passion is not insanity within the meaning of the law. The defendant was evidently controlled by passion and a spirit of revenge, but there is no reason to believe that his mind was diseased; passion controlled his will and motives. The efficient cause of this deplorable tragedy was not insanity. There was no evidence to warrant a doubt of appellant's mental responsibility.

Affirmed.

POWER, SECRETARY OF STATE v. CALVERT MORTGAGE Co.

[73 South. 51.]

1. CORPORATIONS. *Foreign corporations. Filing Charter. Statute. Now doing business within the state. Construction. Retroactive effect.*

The amendatory Act of 1916, chapter 92, does not apply to corporations which had already complied with the law and were thereby lawfully doing business in this state. The act does not by its express terms require a refiling of any charter and the words "now or hereafter doing business in this state," should be interpreted to embrace foreign corporations in fact doing business in this state without having filed their charters, and paid the fees required by section 935 of the Code, and also corporations which should thereafter apply for admission into the state.

2. SAME.

The passage of chapter 92, Laws 1916, repealed section 935 of the Code and any demand thereafter made by the secretary of state is necessarily based upon the new act.

3. SAME.

To hold that this section requires corporations which had already complied with the law to refile their charters, would give to the act a retroactive effect and impose an additional burden upon those corporations doing business in this state by invitation and license of this state.

4. SAME.

A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the legislature. In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their liberal extent to comprehend existing cases.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Suit by the Calvert Mortgage Company against Joseph W. Power secretary of state. From a judgment for plaintiff, defendant appeals.

Appellee is a foreign corporation under the laws of Maryland, engaged in the business of lending money and securing same by mortgages within the state of Mississippi. In coming into the state it complied with the provisions of section 935, Code of 1906. While it was lawfully doing business in Mississippi the legislature passed an act amending section 935 of the Code, the amendatory act being chapter 92, Laws of 1916, approved April 6, 1916, effective from and after its passage. Demand was made upon appellee to refile its charter and pay the fees prescribed by the new act of 1916 aforesaid, and the appellee thereupon paid the fees under protest and brought this suit in the chancery court of Hinds county to recover the amount of the fees alleged to have been unlawfully demanded of it. The material portions of this statute were first enacted by the legislature in 1900, and thereafter were carried forward into the Code of 1906 as section 935. It is the contention of the secretary of state that the words "now or hereafter doing business in this state" requires a refiling and recordation of the charters of all foreign corporations doing business in the state at the time chapter 92, Laws of 1916, was approved. Appellee was permitted to recover in the court below, and from this decree appellant, the secretary of state, appeals.

The constitutionality of chapter 92 is attacked in the bill of complaint, but the disposition made of the case renders it unnecessary to set out all of the averments of the bill and all the points relied upon by appellee.

George H. Ethridge, Assistant Attorney-General, for appellant.

Watkins & Watkins and *Green & Green*, for appellee.

STEVENS, J., delivered the opinion of the court.

In our judgment, the legislature did not intend for the amendatory act of 1916 to apply to corporations which

had already complied with the law, and were thereby lawfully doing business in our state. The act does not by its express terms require a refiling of any charter and the words "now or hereafter doing business in this state" should be interpreted to embrace foreign corporations in fact doing business in this state without having filed their charters and paid the fees required by section 935 of the Code, and also those corporations which should thereafter apply for admission into our state. The passage of chapter 92, Laws of 1916, repealed section 935 of the Code, and any demand thereafter made by the secretary of state is necessarily based upon the new act. To hold that this section requires corporations which had already complied with the law to refile their charters would give to the act a retroactive effect and impose an additional burden upon those corporations doing business in Mississippi by invitation and license of our state.

Mr. Sedgwick on the Construction of Statutory and Constitutional Law, at page 164, says:

"The effort of the English courts appears, indeed, always to give to statutes of that kingdom a prospective effect only, unless the language is so clear and imperative as not to admit of doubt. 'The principle,' says the English Court of Exchequer, 'is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively.' "

Mr. Sutherland on Statutory Construction, par. 464, says:

"A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the legislature. In the absence of such plain expression of design, it should be construed as prospective only, although its

words are broad enough in their literal extent to comprehend existing cases."

The exaction of this license or charter fee is not primarily for the purpose of raising revenue, but is imposed as a method of regulating and supervising the corporate business done in our state by foreign corporations. The filing of these charters gives needed information to those doing business with foreign corporations, and no good could be accomplished by refileing these charters. The essential purpose of the amendatory act is the same as that sought to be accomplished by the code section. The amendatory act is not a new law, but purports to amend, and by its express terms does amend, and in some features perfects, section 935 of the Code.

Our view of this statute renders it unnecessary to discuss the constitutional questions.

Affirmed.

FELDER v. ACME MILLS.

[73 South. 52.]

APPEAL AND ERROR. *Principal and agent. Individual transaction of agent.*

Where defendant gave a written order for flour to plaintiff's agent to be charged to the agent but shipped to defendant, and the order was received by plaintiff, together with a forged order directing that the flour be charged to defendant, and plaintiff, without notifying defendant that it would not ship under the first order, shipped the flour under the forged order, and defendant received and disposed of the flour, believing that it had been charged to the agent who owed the defendant, in such case plaintiff must suffer the loss caused by the act of its accredited agent and cannot recover from defendant for the flour.

APPEAL from the circuit court of Pike county.

HON. J. B. HOLDEN, Judge.

Suit by the Acme Mills against J. H. Felder. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

L. W. Felder and *B. F. Moak*, for appellant.

E. G. Williams, for appellee.

COOK, P. J. delivered the opinion of the court.

Before entering upon a discussion of the merits of this appeal, we deem it necessary to remind counsel that their briefs, to have any value, should be confined to the facts and the law of the case. We are not interested in the personal opinions counsel may entertain of each other.

Appellee sued the appellant for the value of two shipments of flour. Appellant is a merchant, doing business at Holmesville, and it is alleged that the appellant gave the orders to the traveling salesman of appellee, Mr. H. C. Holt. As we understand the record, appellee does not contend that he is not liable for one of the shipments, but does claim that he is not liable for the other.

It seems that the orders were taken upon printed order sheets, the blanks being filled in with the number and value of the packages ordered, and the order is signed by the buyer and the seller's agent. A carbon copy is made of this order and left with the buyer, and the original is sent to the office of the milling company.

It was contended by appellant that the order in question, as signed by him, directed that the flour ordered should be billed to H. C. Holt, meaning that the bill was to be charged to H. C. Holt, but shipped to appellant. The record discloses that this order was received by the milling company, together with another order

for the same bill of flour, but the last-named order did not direct that the flour should be charged to H. C. Holt. Appellant testified, and his evidence was not contradicted, that the last-named order was a forgery; that he did not give or sign same.

It was contended by appellee that Holt was not authorized to take the order to be billed to him, and they were not bound by his contract, that they shipped the flour under the other order; but it is also admitted that appellee did not advise appellant that they had turned down the other order directing that the flour be billed to Holt. So it was, appellant gave the order, provided the company would charge same to Holt, their agent, but the company mentally turned down this order, and shipped under the forged order. Appellant, not knowing about the forged order, received and disposed of the flour believing that the milling company had shipped same under the order signed by him, and had charged the bill to Holt. It appears that appellant had sold Holt an automobile, and the order for flour was to pay the purchase price.

There is absolutely no dispute that the order was given as stated by appellant; that this order was received by the milling company; and that the milling company did not notify appellant that they would not fill the order.

The point is, who must suffer the loss caused by appellee's accredited agent?

The trial court thought that appellant must lose, but we believe, under the facts, appellee should lose.

Reversed and remanded.

DEDEAUX ET AL. v. BAYOU DELISLE LUMBER Co. ET AL.

[73 South. 53.]

1. ADVERSE POSSESSION. *Sufficiency of evidence. Color of title. Possession and occupation. Actual possession. Burden of proof.*

On a bill to confirm title and to cancel defendant's claims, the court held that the evidence set out in the opinion of the court did not establish that defendant entered the land under color of title.

2. ADVERSE POSSESSION. *Possession and occupation.*

Where a party has no color of title to land, he can only acquire title by adverse possession to such part of the land as he has actually held in possession and inclosed, or otherwise actually and continuously occupied, for the statutory period of ten years.

3. SAME.

Where a party occasionally went upon the land, and cut timber thereon and at other intervals burnt some coal kilns on the land but this occupation of the land was not continuous and hostile, nor for a period of ten years, such occupancy falls short of conferring title by adverse possession.

4. ADVERSE POSSESSION. *Burden of proof.*

Where on a bill to confirm title and cancel defendant's claims, the defendant admitted the validity of plaintiff's paper title, but claimed title by adverse possession, the burden of establishing his title by adverse possession is on him.

APPEAL from the chancery court of Harrison county.

HON. J. M. STEVENS, Chancellor.

Bill by O. J. Dedeaux and others against the Bayou Delisle Lumber Company and others. From a decree for defendants dismissing the bill, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Gex & Waller and O. J. Dedeaux, for appellants.

We want to call the court's attention, in discussing the question of adverse possession, to the fact that the complainant introduced no witnesses except a surveyor because its title was perfect of record. The respondents

are the only ones who introduced any testimony at all, and as that does not establish, even by the wildest stretch of the imagination, any sort of possession, we introduced nothing in rebuttal, there being nothing to rebut, so that we are presenting this case solely and simply upon the testimony of the respondent. In connection with their adverse possession, we submit that the only acts of ownership claimed to have been exercised by these parties were such acts as cutting timber now and then, and burning coal kilns at long, separate intervals on lands which the record shows were susceptible of occupancy, in fact good farm lands. See testimony of Drake, the only witness for complainant.

That such acts are not sufficient to establish adverse possession of land has been so often passed upon by this court, it is hardly necessary for us to refer this court to any authority, however, though abundant, caution, we respectfully refer the court to the following cases: *McGehee v. McGehee*, 37 Miss. 151; *Kennedy v. Sanders*, 90 Miss. 542; *Huntington v. Allen*, 44 Miss. 668; *Cohen v. Smith*, 94 Miss. 517; *Stephens Lbr. Co. v. Hughes*, 38 So. 769; *Leavenworth v. Reeves*, 64 So. 660.

Mize & Mize, for appellee.

If there ever was a case in which a right decision was reached, this is one. Appellees and those under whom they claim have been in actual and undisputed possession of this tract of land known as the Chevalier Dedeaux claim since the years 1877 and 1880, at all times claiming it as theirs, mortgaging it, having it assessed to them, paying taxes on it, leasing it, cutting the timber off it for saw mill purposes until it is practically denuded, burning charcoal on it, and never hearing a single protest against any of their acts until this suit was filed in the year 1913.

Appellants have nearly all lived right close to this land, some of them and their ancestors have lived all their lives within a mile and a half or so of this land,

and from 1877, or rather from 1859 and even farther back, have never attempted to assert any claim whatever to this tract, the deed from A. S. Durnee to McCaughan made in 1859 stating that he was selling to McCaughan all the land that was confirmed by the United States to Chevalier Dedeaux except fifty acres south of section 36 reserved by said Chevalier Dedeaux, and the deed from said McCaughan to John Huddleston to his land stated that he was selling to Huddleston all the land confirmed by the United States to said Chevalier Dedeaux except the fifty acres south of section 36 reserved by said Chevalier Dedeaux and the deed from Durnee to McCaughan referred back to another deed prior to 1859 whereby said land was conveyed by Chevalier Dedeaux to Durnee. These deeds to McCaughan and Huddleston were of record, and not one protest or claim was ever made by any of the Chevalier Dedeaux heirs at that time. The land comes on down and is assessed to Huddleston and sold for taxes and bought by W. S. Keel at tax sales and from the state in 1877 and 1880 respectively, and not one claim do we hear from any of the Dedeaux heirs until 1913. So here the appellees and those under whom they claim have paid money for this land and used it and claimed it as theirs from 1877 and 1880 to the present time; it has always been considered as theirs, they paid all the taxes on it; practically denuded it of timber, mortgaged it at various times, leased it, used it as theirs in every way; and not one cent of taxes was ever paid by appellants nor one claim or protest made by them during all those years until in 1913, when they attempt to get the land from appellees by asserting that appellees are not entitled to it on the ground that sections 25 and 36 are fractional sections.

We respectfully submit that the chancellor had overwhelming testimony on which to found his decree that the appellees had been in possession of this particular tract for more than ten years, and that the case of *McCaughan v. Young*, 85 Miss. 277, settles this question,

Opinion of the court.

[112 Miss.]

that their possession has been open, notorious, actual and adverse and such possession as the land was capable of having exercised over it, notwithstanding that two witnesses for appellants testified that it was farming land, and the witnesses for appellees said it was not. Notwithstanding this, the chancellor found that appellees had been in possession of it.

We respectfully submit that this case should certainly be affirmed.

HOLDEN, J., delivered the opinion of the court.

The appellants, O. J. Dedeaux et al., filed their bill in the chancery court of Harrison county, seeking to confirm their title, and to cancel appellees' claim, to certain land described as section 38, township 7, and section 7, township 8, all in range 13, west, St. Stephens meridian, Harrison county, Miss.; and from a decree denying the relief and dismissing the bill, this appeal is taken here.

The undisputed facts, briefly stated, according to this record, are that more than a century ago the land known as section 38, here involved, was granted by the Spanish government to Chevalier Dedeaux, through whom the appellants now claim. The Chevalier Dedeaux moved upon the land, established his residence there, reared his family, and died and was buried there. The old landmarks, the place of his home where he died, as well as his grave, are yet distinguishable, and stand as silent monuments to the memory of this deceased pioneer. Afterwards, his title to the land was confirmed by the United States government, and the appellants here have an unbroken chain of title to it from this ancestor. This proof of a clear title in the appellants having been made before the chancellor, the defendants in the court below conceded the validity of the title in Chevalier Dedeaux, but claimed that they have title to the land by adverse possession; and upon this issue the case was tried out by the lower court.

As proof of title by adverse possession, the appellees introduced two tax deeds made by the tax collector of Harrison county, dated January 1, 1877, and March 3, 1879, which deeds convey to W. S. Keel, through whom appellees claim, "the west one-half fractional sec. 25," and the "west one-half fractional sec. 36," which described land appears to lie immediately east of section 38, the land involved in this lawsuit. The appellees show further that they exercised ownership over section 38 by cutting timber off of it occasionally at different times between 1880 and 1887, and that appellees burned coal kilns on the land occasionally at separate intervals during a long period. It is also disclosed from the testimony that, at different times, a shanty or two were built, either on section 38 or on fractional sections 25 and 36, by appellees. The land was suitable for cultivation, but was not cultivated.

It clearly appears to us from this record that the appellees failed to establish any color of title to section 38, the land here in controversy. Nowhere in this record does it appear that the appellees had ever claimed any paper title to section 38, but their title, as evidenced by the tax collector's deeds and the tax receipts, was the title to the west one-half of fractional section 25, and west one-half of fractional section 36, but there is no claim of paper title to section 38. And while the tax deeds appear to include three hundred and twenty acres of land in sections 25 and 36, yet there is nothing in this record to show that this three hundred and twenty acres was intended to be located anywhere outside of sections 25 and 36. Therefore the proof fails to show that the appellees entered the land (section 38) under color of title. The appellees, having no color of title to section 38, could only acquire title by adverse possession to such part of the land as was actually held in possession and inclosed, or otherwise actually and continuously occupied, for the statutory period of ten years.

The evidence in this case shows that the appellees occasionally went upon section 38, and cut certain timber thereon, and at other intervals burnt some coal kilns on the land, but it seems from all of the testimony that this occupation of the land, if it can be said to be an occupation, was not continuous and hostile, nor was it for a period of ten years; and we think that the most that can be said of the claim of adverse possession is that it was continuous only for a period of about seven years, thus falling far short of the statutory requirement of "ten years' actual adverse possession, . . . claiming to be the owner for that time."

In view of these conclusions, we do not think that the defendants in the court below met the burden of proof required in establishing their title to the land by adverse possession, and we hold that the title to section 38 here involved remains in the appellants as heirs of the Chevalier Dedeaux.

The decree of the lower court is reversed, and decree entered here for appellants.

Reversed.

CRENSHAW BROS. SEED Co. v. RAUCH.

[73 South. 53.]

SALE. Contract. Excuse for non-performance. Attempted modification.

Where a contract for the sale of peas was fully consummated by a telegram from the buyer to the seller and afterwards the buyer wrote to the seller confirming the telegram but asking for a better grade of peas, this was no defense to an action on the contract first made.

APPEAL from the circuit court of Pontotoc county.

HON. CLAUDE CLAYTON, Judge.

Suit by Crenshaw Bros. Seed Company against Louie Rauch doing business under the name of Rauch Produce Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Mitchell & Roberson, for appellant.

Marshall T. Adams and *C. Lee Crum*, for appellee.

POTTER, J., delivered the opinion of the court.

This is an appeal from the circuit court of Pontotoc county. Crenshaw Bros. Seed Company, the appellant, was plaintiff in the court below, and Louie Rauch, doing business under the firm name and style of the Rauch Produce Company, defendant there. The appellant and appellee, after various negotiations by wire, made a contract by which the appellee agreed to sell and the appellant agreed to buy four hundred and fifty bushels of peas f. o. b. Tampa, Fla. After this contract had been made by telegram the appellant in confirmation thereof wrote the following letter dated April 27, 1914:

"This is to confirm our telegram of April 24th accepting your offer of Clay, Whip-poor-will, and mixed peas, if first-class stock. Kindly take precaution and have them thoroughly cleaned, seeing that they are in first-class condition."

About twelve days after the letter was written appellee shipped one hundred and seventy-five bushels of peas from Memphis to the Crenshaw Bros. Seed Company, bill of lading attached, for the agreed price of same and the draft was paid. The letter in question was not received by the appellee until after the shipment of the one hundred and seventy-five bushels of peas above mentioned, because he was at Memphis at the time the letter

reached Pontotoc, and did not get home until after he had shipped the peas. Upon receipt of the letter the appellee, according to his version, considered the contract canceled because appellant in its letter of April 27th asked for thoroughly clean peas and first-class stock, and that he had not sold it that grade of goods. The record shows that the appellant made numerous requests by wire of the appellee to ship the balance of the contract, but appellee finally advised appellant that he declined to fill the balance of the order contracted for. Appellant showed that it had to buy peas in the open market, which appellee had contracted to sell it, at a higher price than the contract with the appellee. Under the proof in this case the court erred in refusing to grant plaintiff a peremptory instruction for such damages as the evidence shows it sustained. If the sort of peas mentioned in the plaintiff's letter were not the kind stipulated for in the original contract, the appellee could have insisted on the appellant standing by the contract and receiving the peas contracted for. The appellant received and paid for one hundred and seventy-five bushels of the peas contracted for, and the appellee could not relieve himself from his contract without offering to carry it out under the terms as originally stipulated. The appellee not only failed to tender a performance of his part of the contract, but repudiated the contract by a positive refusal on his part to carry it out.

Reversed and remanded.

DEAN v. SOUTHERN RY. CO. IN MISSISSIPPI.

[73 South. 55.]

RAILROADS. *Operation. Noise. Damage.*

Where after the construction of defendant's main line of railroad, plaintiff acquired a residence a short distance from the right of way, and thereafter to furnish facilities to a compress company defendant, over its own property, constructed a spur track leading to the compress, and the business done over this spur track was of the same character as that done at regular freight depots, such spur track was installed to serve the general public, and the act of installation must be characterized as a public and not a private act of the railway company. In such case where there was no complaint or proof that smoke, dust, sparks or cinders were projected by defendant's engines and trains over and upon any of plaintiff's property, but the sole ground of complaint was the noise produced by the orderly operation of the cars, the plaintiff could not recover for injuries caused only by the noise, it being a case of *damnum absque injuria*.

APPEAL from the circuit court of Leflore county.

HON. F. E. EVERETT, Judge.

Suit by G. G. Dean against the Southern Railway Company in Mississippi. From a judgment for defendant, plaintiff appeals.

Mr. Dean, the appellant, is a resident citizen of Greenwood, Miss., and in this action complains of the Southern Railway Company, the appellee, on account of the noise made by the operation of appellee's trains over and upon a certain spur or service track placed by the railway company in the city of Greenwood, near Mr. Dean's home, to accommodate the business of a large compress.

At the time this suit was instituted Mr. Dean was about seventy years old, and was the owner of a lot upon which was his residence, a servant's house, cook's house, and barn, and also a residence constructed by him for the purpose of renting to tenants. It appears that the main line of the Southern Railway Company in Mississippi

was constructed in 1888 or 1889 by the Georgia Pacific Railroad Company, and ran across the northern end of block 1, which was divided into four lots, one of which, lot 4, Mr. Dean purchased in 1893 or 1894. At the time he purchased his lot there was a residence thereon, into which he, with his family, moved. His family consists of himself, his wife, his adult son, Tom, who furnished the money to pay for the property, and a granddaughter of the plaintiff. One of the houses was constructed by Mr. Dean, at a cost of one thousand dollars, after he purchased the lot. A map is referred to by counsel, but this map is not in the record, and it is difficult to determine the exact measurements in reference to the location of plaintiff's property from the spur track in question. It appears, however, that Mr. Dean's home adjoins the main right of way of appellee, and that about a year before the institution of this suit a spur track was installed by the railroad company across the main line from Mr. Dean's home; the switch or beginning of this spur track being about one hundred and fifty feet northwest of Mr. Dean's property, and projecting a distance along the northern boundary of the right of way, estimated as two hundred and fifty or three hundred yards. This spur track runs into a large compress, and was placed there for the purpose of unloading and loading cotton handled by the compress. This is a suit for damages to plaintiff's property by reason of the noise made by the cars of appellee as they are drawn in and over this spur track. Plaintiff and his son testify that in placing cars on this side track what is known as "running switches" are made, some of the cars, when the switch is thrown, coming up on the main line opposite plaintiff's house. There is evidence that the noise is so great that plaintiff and his family cannot rest well at night, and at times cannot well hear conversation when this switching is going on. There is evidence also that the steam engine employed for the purpose of placing and taking out cars buzzes, and thereby adds to the noise

complained of. Mr. Tom Dean, plaintiff's son, testifies that the portion of the spur track across the main line directly opposite the house and on the north side of the main line is about two hundred and twenty-five feet from the dwelling house.

At the conclusion of plaintiff's testimony there was a motion to exclude the evidence and to grant a peremptory instruction in favor of appellee. This motion was by the court sustained, and judgment accordingly entered in favor of the defendant. From this judgment, appellant appeals.

Monroe McClurg, for appellant.

Catchings & Catchings, for appellee.

STEVENS, J., delivered the opinion of the court.

While the evidence on behalf of plaintiff in the court below undisputably shows that the noise from the operation of appellee's freight trains over and along the spur track complained of is at times very great, so much so that plaintiff could not sometimes sleep well at nights, and at times could not hear well a conversation in his home, we are nevertheless forced to the conclusion that under the facts of this record a case was not made out, and the action of the court below in excluding plaintiff's testimony should be approved.

The residence of plaintiff is on the south side of the right of way over which the main line of railway runs, and this residence faces south. The spur track was installed on the opposite side of the main line, north of plaintiff's property, and leads to and is made necessary by the business done by and at a large compress. This spur track in no wise invades the plaintiff's property, but is on the private right of way of the railroad. It does not run over or along any street in front of plaintiff's property. There is no complaint or proof that smoke,

dust, sparks, or cinders are projected by appellee's engines and trains over and upon any of plaintiff's property. The sole ground of complaint is the noise produced by the operation of cars.

It may be conceded that noise, under some circumstances, may be so great as to amount to a private nuisance. The evidence in the instant case shows that the noise occasioned by the use of the spur track is no greater than is necessary in the operation of the trains and the doing of needed switching. Plaintiff does not complain of private switchyards installed by the railroad company. The spur track here complained of is a service track, made necessary for the depositing and taking aboard of large quantities of cotton handled by a large compress—the legitimate railroad business required by a legitimate compress business. There is no contention by appellant that this service track is unnecessary, or that there is any negligence by the railroad company, either in the selection of its engines and cars or in the way they are handled and switched at this point. The compress company had the right to call for the installation of this service track, and, if the railroad company should decline to install or furnish this track, it could be compelled to do so by the Railroad Commission. The business done over this spur track therefore is the same character of business done at the regular freight depots. The spur track was installed to serve the public generally, and the act of installation must be characterized as a public and not a private act of the railway company. The noise produced by the defendant's trains over and upon this spur track falls in the same class as the noise produced by the operation of trains over the main line of railway. Railroad trains cannot be operated without noise. A material amount of noise is produced by steam railways, street railways, manufactories, automobiles, and various other agencies employed by modern civilization. If railway trains were noiseless, then it would profit one nothing to stop and listen at a crossing. The

greater weight of authority sustains the holding that any injury which is a result of noise produced by the operation of trains on main lines, even though it may at times inconvenience and irritate, is *damnum absque injuria*.

The legal principles contended for by learned counsel for appellant are, in the main, perfectly sound, but inapplicable to the facts of this case. It may be conceded that a railroad company is not protected by its charter in creating a private nuisance. It cannot locate its machine shops, roundhouses, coal chutes, water tanks, or private switchyards near or adjacent to private property under such circumstances as to create a private nuisance and thereby depreciate or damage private property. In the placing or construction of these conveniences the railroad company has the power of selection; its act in placing or installing these necessary conveniences must be classed as the private acts of a public corporation. In placing these conveniences it has no greater rights, of course, than any individual or private corporation would enjoy. But in the installation of a spur track like the one here complained of the railroad company has no option. It must afford the service, and in doing so it is serving the public generally. The cotton industry of the country demands compresses, and the patronizing public have a right to have their cotton transported by appellee and deposited at this compress, and taken therefrom as occasion demands. If the railroad company operates trains properly equipped and in the usual way, without negligence, the noise produced is a necessary incident to the business done by appellee as a common carrier. This distinction is clearly drawn and the doctrine abundantly supported by the leading case relied upon by counsel for appellant. Counsel relies with confidence on the case of *Matthias v. Minneapolis, etc., R. Co.*, 125 Minn. 224, 146 N. W. 353, 51 L. R. A. (N. S.) 1017, and says in his brief that:

This case "was presented with great research and learning; the court gave the case the greatest consideration, and the opinion is of the highest order of ability."

Looking to the opinion, then, in the Matthias Case, we quote with approval the very distinction made by it and all of the leading authorities. The court says:

"And as sustaining the view herein before expressed that railroad shops, roundhouses, and switchyards like the one in question here stand on a different footing from tracks between stations, passing tracks, depots, freight-houses, and yards for receiving and delivering shipments, in respect to their location and operation being a private injury or nuisance which the law will redress, may be cited *Cogswell v. N. Y., etc., Ry. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Spring v. Delaware, etc., Ry. Co.*, 88 Hun, 385, 34 N. Y. Supp. 810; *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 23 Am. St. Rep. 673; *Louisville & Nashville Terminal Co. v. Lellyett*, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. (N. S.) 49. In the last-named case it is held that a terminal railway company in exercising the discretion conferred by the legislature to locate its yards and terminal facilities acts at its peril not to create a nuisance to neighboring property. There the plaintiff's property was two hundred and twenty-five feet away from the original tracks; the terminals were located beyond these. The court says: 'We are of opinion that, in so far as the growth and increase of travel and traffic into and through the station has brought discomfort to plaintiff, he is without remedy. In other words, the roads have the right to accommodate their increasing traffic and travel without liability, so long as their trains are operated without negligent disregard of the comfort and usable value of plaintiff's property, and, for this purpose, to lay such additional tracks, side tracks, and switches into and through the station as may be required to accommodate such travel and traffic, both passenger and freight, and it is only for the additional conveniences of roundhouses, sandhouses,

coal bins, coal chutes, and the switchyards and tracks necessary to operate such additional conveniences, which might be located elsewhere, though not so advantageously, perhaps, that the plaintiff can complain, if they materially damage plaintiff's property.' In *Townsend et al. v. Norfolk Ry. & L. Co.*, 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558, it was said: 'Damage occasioned by the location of a power house (for the railway) does not stand on the same footing as damage resulting from the operation of a railway along an authorized route.' . . .

"Cases relied on by defendant come nearly all within the principle conceded by plaintiff, namely, that in so far as disturbance, smoke, and dust emanate from the operation of a railroad between and at stations, there is no redress for the individual who may suffer in the use and enjoyment of his property. *Twenty-Second Corp., etc., v. Oregon S. L. Ry. Co.*, 36 Utah, 238, 103 Pac. 243, 23 L. R. A. (N. S.) 860, 140 Am. St. Rep. 819, was a case where increasing traffic required additional operating or passing tracks. *Hyde v. Minn. Ry. Co.*, 29 S. D. 220, 136 N. W. 92, 40 L. R. A. (N. S.) 48, related to tracks in connection with a properly located depot. *St. Louis, San Francisco, etc., Ry. Co. v. Shaw*, 99 Tex. 559, 92 S. W. 30, 6 L. R. A. (N. S.) 245, 122 Am. St. Rep. 663, is evidently not out of harmony with *Rainey v. Red River Ry. Co.*, *supra* [99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A. (N. S.) 590, 122 Am. St. Rep. 622, 13 Ann. Cas. 580]; for it relates to the necessary facilities and operations of trains at a properly located station. It holds that personal discomfort to adjoining proprietors occasioned by the operation of cars in the station yards cannot be made the basis of a cause of action against a railroad company, when there is nothing improper in its selection of the particular locality for its tracks or in the operation of its cars thereon, and no depreciation in the value of the complainant's property therefrom. The court says: 'It is hardly necessary to

add that side tracks at such stations are an essential part of the road, and are as much authorized and required as the main line and station. It cannot be held, therefore, that the mere location of such tracks and stations near the property of others gives rise to the liability here asserted. If so, the same liability would arise to every one who might be annoyed by trains passing along the main line, for no reason could be given for liability in one case which would not be valid in support of it in the other; and yet it has often been held that no such liability can be sustained consistently with the law which authorizes the construction of such *quasi* public works.' *Dolan v. Chicago, etc., Ry. Co.*, 118 Wis. 362, 95 N. W. 385, holds that the undesirable consequences to nearby property from the location of a railroad stockyard for receiving cattle for shipment, as required by statute, does not constitute a private nuisance if constructed and managed with reasonable care. Even in the absence of a statute on the subject, public convenience, as already intimated, would in most instances require shipping stockyards near or at the station."

It will be observed that the Minnesota court referred to the case of *Townsend v. Norfolk, etc., R. Co.*, 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558, involving the location of a power house. It was held that the railroad company had no right to locate its power house at a place and in a way to create a nuisance; that its act in so doing was the private and not the public act of a corporation. And the same distinction is made and the same doctrine applied in the well-reasoned case of *Terrell v. Chesapeake & Ohio R. Co.*, 110 Va. 340, 66 S. E. 55, 32 L. R. A. (N. S.) 371. The court, by CARDWELL, J., says:

"It cannot be maintained that the storing, blowing out, cleaning, and firing of engines on an open yard is more incidental to the public function of carrying passengers than a roundhouse for the sheltering of engines, or a power house for the generation of electrical power. The

one is not, when considered on a demurrer to a declaration or to a plea setting up such a defense, any more incidental to the performance of the public function of the carrier than the other. The true distinction between a public and a private function, when exercised by a public service corporation, is so lucidly and exhaustively drawn in the Townsend Case that little need be added to what is there said. As a preface to the discussion of the question in that case the opinion says: 'A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that, in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and, if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*.' "

The principle announced in the Townsend Case is the underlying principle which governed the decision of our own court in the case of *King v. Railway Co.*, 88 Miss. 456, 42 So. 204, 6 L. R. A. (N. S.) 1036, 117 Am. St. Rep. 749. The facts of the instant case differentiate it from the case of *Railway Co. v. King*, 93 Miss. 379, 47 So. 857, 22 L. R. A. (N. S.) 603. In the last-named case there is evidence that the railroad company projected soot, smoke and dirt—deleterious agencies. The legal principles that should control the instant case are announced with clearness and ability in the case of *Roman Catholic Church v. Penn. R. R. Co.*, 207 Fed. 897, 125 C. C. A. 629, L. R. A. 1915E, 623. The opinion of Judge GRAY in that case appears to us a just and sound pronouncement, and many of the authorities referred to by Judge GRAY are in point here. The opinion clearly differentiates the case at bar from the leading case of *Baltimore & Pacific Ry. Co. v. First Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27

L. Ed. 739; as also the so-called "Elevated Railroad Cases." *Lahr v. Metropolitan El. Ry. Co.*, 104 N. Y. 268, 10 N. E. 528; *Story v. New York El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Bohm v. Metropolitan El. Ry. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; *Sperb v. Metropolitan El. Ry. Co.*, 137 N. Y. 155, 32 N. E. 1050, 20 L. R. A. 752. Cases exist where a water hydrant or tank or other structure placed by a railroad company on a public street has interfered with the right of ingress or egress to private property. It is stated by Judge GRAY in *Roman Catholic Church v. Railroad*, *supra*, that:

"It is not denied that the railroad of the defendant, as here complained of, was lawfully located, as authorized by the legislature of New Jersey and for the public purposes stated in its charter. To fulfill these public purposes, it was authorized, among other things, to use steam for the propulsion of its engine and the movement of its trains. Steam, of course, cannot be created except by the combustion of fuel, and the combustion of fuel inevitably produces more or less smoke. These usual and normal results of the operation of a railroad, like the noises created by the movement of its trains, are necessarily contemplated and taken into account by the legislature that authorizes its construction. They enter into the common experience of modern life and are recognized as necessary accompaniments of the convenience and advantages which railroad transportation brings to the public. Their sufferance is one of the penalties of living in a large community like a city. The annoyance and inconvenience occasioned thereby are to be viewed from the same legal standpoint as are the annoyance and inconvenience necessarily suffered by those who live along a turnpike or other highway. Some dust and noise arising from the traffic along such highways are the necessary and unavoidable incidents of the authorized and lawful use thereof. The same may be said of the noise of street cars. It is an undoubted annoyance to the people living along their route. To many people it is a se-

rious annoyance, often interfering with sleep and quiet home life. As said by Judge McPHERSON in the case of *Bunting v. Pennsylvania R. R.*, *supra* [(C. C.) 189 Fed. 551], the perfectly proper use of these vehicles constitutes an annoyance, from which people suffer and sometimes seriously, but this inconvenience is an injury for which there is no redress."

It is a matter of regret that appellant has experienced so much inconvenience from the operation of appellee's trains. It will be noted, however, that he purchased this property at a time when the railroad was in operation and after the railroad company had acquired its lawful right of way. Appellee is doing nothing more than making use of its right of way for the lawful and proper operation of its trains and to accomplish the purposes for which it was chartered and for which it condemned and paid for a right of way. We do not think the facts of this case establish the existence of a private nuisance. If they did, it would seem to follow that appellant would have the right to maintain a bill in equity to abate the nuisance. It was held in *Griveau v. So. Chicago City Ry. Co.*, 130 Ill. App. 519, that noise alone is insufficient to sustain an action for damages against a railroad company. To the same effect is the holding in *Aldrich v. W. Side El. Ry. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237. It was well said by Chief Justice SIMRALL, speaking for our court in *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378:

"The complainants prefer to live in a city from motives which induce others to do the same thing in numbers sufficient to constitute a city. Such a community has its advantages and its inconveniences. Of the latter are dust, smoke, noise, and increased risk of conflagration. The elements which make up the city are its trade, commerce, and manufactures; incident to them are the noise of machinery, the presence of dust, and air less pure than in the country."

Affirmed.

SIMPSON ET AL. v. MCGEE ET AL.

[73 South. 55.]

WILLS. Construction. Instrument taking effect at death of grantor.

Where it is clear from the language of an instrument in the form of a deed that it was the donor's intention that the instrument itself, should not take effect, for any purpose, until after the death of the maker, it must be held to be testamentary in character, and therefore not a deed.

APPEAL from the chancery court of Newton county.
HON. G. C. TANN, Chancellor.

Suit by Monk Houston McGee and others against Julia Simpson and others. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Byrd & Byrd, for appellants.

The only question to be determined by the court in this case is whether or not the instrument on page 16 of the record is a deed or a will. If it be a deed then the case should be affirmed; if a will then it should be reversed. We respectfully submit that it is a will. The clause in the instrument that determines its character is as follows: "This to take effect only after the death of the said Harriet Houston."

In determining whether an instrument be a will or a deed, the question is, did the maker intend to convey any estate or interest whatever, to vest before her death and upon the execution of the instrument, or did she intend that all the interest and estate should take effect only after her death? If the former, it is a deed; if the latter, a will; and it is immaterial whether she called it a will or deed, the instrument will have operation according to it's legal effect. The instrument under consideration is in form a deed and acknowledged as a deed, yet it is clear from the terms of the instrument

that it was not to take effect only after the death of the grantor, or the maker thereof. That being true all the authorities hold that it is testamentary in character and therefore cannot be upheld as a deed. The word "only" as used in this instrument determines its character: "This to take effect only after the death of the said Harriet Houston," the grantor. This test is upheld by every authority that we have been able to find on the subject. *Delvin on Deeds* (2 Ed.), sec. 855C; *Wall v. Wall*, 30 Miss. 91; *Sartor v. Sartor*, 39 Miss. 760; *Cunningham v. Davis*, 62 Miss. 366; *McDaniel v. Johns*, 45 Miss. 632.

Appellee, defendant in the lower court, filed a demurrer to plaintiff's bill to test the question as to whether the instrument sued on here was a will or a deed; the court overruled the demurrer which in our opinion was error. Thereupon an answer was filed and proof taken as shown by the record. If the acts and declarations of the maker of the instrument are to be taken into consideration in determining its character then the testimony in this record overwhelmingly shows that the maker of the instrument intended it to be a will. Some years after the execution thereof she made inquiries as to whether she could deed the property after she made a will and was advised that she could. She then, immediately thereafter, executed a warranty deed without any reservations whatever conveying the property to appellants.

We respectfully submit that the proof in this case has nothing whatever to do with the question at issue. The construction of the instrument alone is the question to be dealt with.

W. I. Munn, for appellee.

It is sought in the bill of complaint filed by the appellees in the chancery court of Newton county Mississippi, to cancel the deed made to appellee Julia Simpson also to cancel the two Hill deeds of trust. Appellants

filed a demurrer to the bill of complaint, which was overruled, and the appellants were given sixty days in which to file an answer, the answer was filed out of time and after which testimony was taken and the case was submitted, on bill, answer, cross-bill, and proof, and a decree was rendered in favor of the appellee, granting the prayer of the bill. From the opinion of the chancellor the case comes to this court.

Now the instrument executed by Harriet Houston to the appellees on the 5th day of March, 1894, has all the earmarks of deed except the phrase, "to be and take effect only after the death of the said Harriet Houston." We think that there would be no difference if this clause read, "at the death of Harriet Houston." "At death" and "after death," are synonymous terms, and mean the same. This clause in the instrument is the only wording that is of a testamentary character, and all other parts of the instrument are of the nature of a deed; everything is certain and fixed.

When this document was executed and delivered it was placed beyond the control of the donor. No provision was made for revocation. Surely the donor Harriet Houston intended the document for a deed and not a will. She placed it beyond her reach when she executed and delivered it to the donees who immediately came into possession of the property, furnished money to pay the taxes and built houses on the land. The deed was immediately delivered over to Monk Houston one of the appellees who had the same recorded, and who has had possession of the deed since that time.

This makes the conveyance conclusive as a deed and not a will. And further taking the conveyance as a whole and viewing it from its legal effect, only, and not considering it in the light of the testimony as a whole it has the effect of a deed and not of a will. All parts of the conveyance are akin to a deed and not a will; it has a consideration; it warrants the title; it is acknowledged as a deed; it is delivered, and acceptance pre-

sumed under the law. This is upheld in the case of *Wall v. Wall*, 30 Miss. 91, and cited by counsel for appellants.

The case of *Sartor v. Sartor*, cited in 39 Mississippi, page 360, is different from the case at bar, this deed or instrument was based upon contingencies, and no interest *in praesenti* passed to the donee. In the case of *McDaniel v. Joh*, 45 Miss. 632, it was held to be a deed as in the *Wall Case*. The instrument under consideration in the *Wall* and *McDaniel* cases had more the similarity of wills than the one at bar, and in each instance our court held them to be deeds and not a will.

The *Cunningham* case cited by counsel has no bearing on the case at bar as we read it; considering the case in the light of the demurrer and on the face of the record there seems to be no question that the donor Harriet Houston, intended the instrument as a deed and not a will. If we accept the testimony as competent it then appears that the donees came in possession of the property, paid the taxes and otherwise improved the estate. We submit that the case should be affirmed.

SMITH, C. J., delivered the opinion of the court.

On the 5th day of March, 1894, Harriet Houston executed and delivered to Babe, Monk, and Lutie Houston an instrument in writing, in form a deed, conveying certain property, and containing the following provision: "This to take effect only after the death of said Harriet Houston." On the 17th day of October, 1904, Harriet executed and delivered to Julia Simpson a regular deed to the same property. Both of these instruments were properly acknowledged, and the first was filed for record in the office of the chancery clerk of Newton county on the 9th day of April, 1895, and the second on the 22d day of November, 1904. After the death of Harriet, which occurred in 1905, Babe, Monk, and Lutie Houston, appellees herein, filed a bill in the

court below, praying for the cancellation of the deed executed by Harriet to Julia, and also of two deeds of trust which Julia had given on the property. Julia, the trustee, and beneficiaries in the deeds of trust given by her, who were made parties defendant to this bill, filed an answer and cross-bill, praying for the cancellation of appellees' claim to the property. The decree was in accordance with the prayer of the original bill.

If the instrument executed by Harriet, under which appellants claim title to the land, is a deed, the decree of the court below is correct; if it is not a deed, but is testamentary in character, the decree is erroneous. It is clear from the language hereinbefore quoted from this instrument that it was the donor's intention that the instrument itself should not take effect, for any purpose, until after her death; consequently, under the rule announced in *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147, and applied in *Sartor v. Sartor*, 39 Miss. 760, and *Cunningham v. Davis*, 62 Miss. 366, it must be held to be testamentary in character, and therefore not a deed.

Reversed, and decree here in accordance with the prayer of appellants' cross-bill.

Reversed.

COHN ET AL. *v.* BRINSON.

[73 South. 59.]

1. GAMING. *Futures. Recovery of loss. Statutes. Agent or intermediary. Money lent or advanced. Cancellation of mortgage. Invalidity. Wages.*

Under Laws 1908, chapter 118, prohibiting dealings in futures and declaring such contracts unlawful and section 9 providing that the wife of a person sustaining a loss in future transactions, may within five years, recover, by suit, the amount so lost as liquidated damages from the broker, agent, or intermediary

negotiating such transactions, a bank which did not represent any cotton broker with whom plaintiff's husband did business, did not receive the market quotations, and take orders for future contracts, had no private wire over which to receive quotations and to submit orders, in short was not the agent or intermediary through whom plaintiff's husband did a gambling business, was not liable to the wife for the losses of her husband in gambling transactions in futures.

2. **GAMING. Money lent or advanced. Recovery. Statutes.**

Under Code 1906, section 2302, giving a right to the wife of any one losing and paying money at gaming or wagering, a right to recover it, without expressly giving the wife the right to recover from a bank money knowingly lent or advanced for the purpose of gambling and section 2303, declaring futures unlawful, and giving her the right to sue for and recover money lost and paid on futures from the principal or agent knowingly receiving the money on such illegal transactions, the wife of one dealing in cotton futures directly with brokers in another state, could not recover money lent or advanced by a bank which knew of the borrower's dealings and never repaid, except by renewals forming a part of the consideration of a note secured by a mortgage of her homestead and other property.

3. **GAMING. Dealing in futures. Recovery. Statutes.**

Under Code 1906, section 2300, making absolutely void and unenforceable any contract for the reimbursing, or repayment of any money knowingly lent or advanced for the purpose of gambling, and section 2301, providing that any mortgage or conveyance of any real estate to satisfy or secure money loaned or advanced for such purpose shall vest in the wife and children of the mortgagor the whole title of the mortgagor as though he had died intestate, the wife of one to whom a defendant bank knowingly lent or advanced money for use in dealing in cotton futures, unpaid except by renewals forming a part of the consideration for a note secured by a mortgage executed by herself and husband including their homestead and her separate property, was entitled to have the mortgage cancelled whereupon the property would immediately vest in herself and children if any.

4. **SAME.**

In such case it was immaterial that the borrower had the right to buy cotton futures by mail or wire directly from brokers in another state, since it is the policy of the law to prohibit gambling of any kind and to deny the courts of the state to enforce gambling contracts no matter where made.

5. GAMING. *Futures. Invalidity. "Wager."*

It is settled law that the contract for the purchase and delivery of a commodity in the future and for the payment of the difference in price arising out of the rise and fall in the market above or below the contract price is a wager on the future price of the commodity, and is for that reason void when the real intent of the parties is simply to speculate on the rise and fall of prices and the goods are really not to be delivered.

APPEAL from the chancery court of Lincoln county.
HON. LUTHER E. GRICE, Special Chancellor.

Bill in equity by Mrs. Allie V. Brinson against Louis Cohn and L. H. Baggett, assignees, and the Commercial Bank and Trust Company. Decree for the complainant in part, and defendants prosecute a direct appeal, while complainant prosecutes a cross-appeal.

Appellee was complainant in the court below, and appellants defendants. The opinion states the facts. The laws quoted in the opinion contain the following provisions.

Sections 2301, 2302, and 2303, Code of 1906, are as follows:

2301. Any sale, mortgage, transfer, or conveyance of any estate, real or personal, to any person or to another for his use or benefit, or in any manner to satisfy or secure money or other thing won, or any part thereof, or to secure or satisfy any money or other thing lent or advanced on any consideration, foundation, or purpose mentioned in the last section, or any part thereof, shall inure to and vest in the wife and children of said mortgager, seller, vendor, bargainor, or lessor, the whole estate, title, and interest of such person sold, mortgaged, bargained, transferred, or conveyed, as though such person had died intestate. And the parties to any action founded on any contract or transaction within this chapter, shall be compelled to answer any bill of discovery touching the same.

2302. If any person, by playing at any game whatever, or by betting on the sides or hands of such as do play

at any game, or by betting on any horse-race or cock-fight, or at any other sport or pastime, or by any wager whatever, shall lose any money, property, or other valuable thing, real or personal, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, or his wife or children, may sue for and recover such money, property, or other valuable thing so lost and paid or delivered, or any part thereof, from the person knowingly receiving the same, with costs.

2303. A contract for the purchase or sale of a commodity of any kind, to be delivered at a future date, the parties not intending that the commodity is to be actually delivered in kind and the price paid, shall not be enforced by any court; nor shall any contract of any kind commonly called "futures" be enforced, nor shall a contract in this section mentioned be a valid consideration, in whole or in part, for any promise or undertaking and any person who shall make any such contract and by reason thereof lose any money, property or other valuable thing, real or personal, and shall pay or deliver the same or any part thereof, may, or his wife or children may sue for and recover such money, property or other valuable thing so lost and paid or delivered, or any part thereof, from the person knowingly receiving the same, either for himself or as agent for another, together with all costs of suit.

Section 9 of chapter 118 of the Laws of 1908 is as follows:

Sec. 9. That the parents or parent, wife, child or children, executor or administrator of the person sustaining a loss, . . . may, within five years from the date such loss was sustained, recover by suit in the circuit court or chancery court, the amount so lost, by the person making such contract, which sum shall be considered as liquidated damages to the person suing therefor, from the broker, agent or intermediary who negotiated such transaction.

This suit originated in the chancery court of Lincoln county by a bill in equity filed by Mrs. Allie V. Brinson, appellee and wife of T. H. Brinson, to recover from the Commercial Bank & Trust Company certain sums of money alleged to have been lost by the husband of complainant in gambling on cotton futures, and to cancel a certain mortgage executed by Mr. and Mrs. Brinson to the bank as security for the balance of an indebtedness of one thousand seven hundred seventy-four dollars and ninety-four cents due by the husband to the bank. Appellants are the assignees and receivers of the Commercial Bank & Trust Company. The mortgage in question was given December 18, 1913, in renewal of a prior mortgage securing a larger indebtedness, upon which large payments had been made, and embraced in the mortgage is the homestead of Mr. Brinson, title to which is in his name, and also a certain parcel of real estate standing in the name of Mrs. Brinson. The bill alleges that the said bank knowingly lent or advanced Mr. Brinson large sums of money at different times to buy cotton futures and to provide the necessary margins on his investments upon the cotton exchange of New Orleans, La.; that the indebtedness secured by the mortgage sought to be cancelled was founded upon an illegal consideration; that the contracts for the repayment of the money were void at law and in equity; and the mortgage in question should be canceled. The bill claims a right also to recover the aggregate sum of four thousand six hundred dollars alleged to have been lost by the husband in gambling on cotton futures through the said Bank & Trust Company. Answer was filed by appellants, and the cause heard on bill, answer, and oral testimony. The special chancellor who heard the case permitted the complainant to recover the aggregate sum of two thousand two hundred and fifty-one dollars and twenty cents, which he found to have been paid by Mr. Brinson to the Bank & Trust Company on gambling transactions; but the chancellor declined to grant

[112 Miss.]

Opinion of the court.

the full relief prayed for, and declined to cancel the mortgage. From this final decree appellants, as the defendants in the court below, prosecute a direct appeal, and appellee prosecutes a cross-appeal.

It is the contention of appellants that complainant was not entitled to recover anything under the facts of this record, while appellee, as cross-appellant, predicates her right to relief in this court on the alleged error of the chancellor in declining to cancel the mortgage, under the authority and in pursuance of the provisions of section 2301, Code of 1906. The record is voluminous, and for a full understanding of the opinion a summary of the facts is unnecessary. Appellant seems to rely upon the Code sections, chapter 56, Code of 1906, on gambling contracts, as well as chapter 118, Laws of 1908, being an act to prohibit dealing in "futures" and to suppress "bucket shops."

H. C. Cassedy and J. W. Cassedy, for appellants.

G. Wood Magee, Brennan & Boothe and W. C. Wells, for appellee.

STEVENS, J. delivered the opinion of the court.

The testimony in this case establishes beyond doubt that T. H. Brinson, the husband of appellee, was a regular customer of the Commercial Bank & Trust Company, with whom Brinson carried an account, and from whom he borrowed sums of money from time to time. The bank was doing a regular banking business, and was in no sense operating a bucket shop, contrary to any of the provisions of chapter 118 of the Laws of 1908. The bank did not represent any cotton brokers of New Orleans with whom Mr. Brinson did business; it did not receive the market quotations and take orders for future contracts; it had no private wire over which to receive quotations and to submit orders; it, in short, was not the agent or intermediary through whom Mr.

Brinson did a gambling business. The provisions of chapter 118, Laws of 1908, therefore, do not apply in this case, and the right of the wife to recover alleged back losses cannot be based upon the statute of 1908.

Looking to the Code sections, it will be observed that sections 2302 and 2303 are the only other statutes granting to the wife or children the right to sue for and recover money lost or paid on gambling transactions. Under the express provisions of section 2302, no right of action is given a wife to recover from a bank money knowingly lent or advanced for the purpose of gambling. The right accorded to the wife under section 2303 of the Code is the right to sue for and recover money lost and paid on "futures" from the principal or agent knowingly receiving the money on such illegal transactions. This section is designed to afford a remedy against the principal or agent handling the future contracts. In the instant case Mr. Brinson did business directly with J. M. Harrison & Co. and Moyse & Holmes, cotton brokers and dealers in futures in New Orleans, La. The chancellor found as a matter of fact that the bank had knowledge that Brinson was borrowing money for the express purpose of gambling in futures, and the proof abundantly justifies this conclusion. The bank knew full well the purpose which induced Brinson to apply for accommodations, and it did not hesitate to supply Mr. Brinson the needed capital for gambling purposes, lending him various sums of money, and taking his demand notes therefor. The proof shows, further, that the material portion of the money originally advanced for this purpose was never in fact repaid, but by a series of renewals went into and formed a part of the consideration of a note for one thousand seven hundred seventy-four dollars and ninety-four cents secured by the mortgage in question. It is true that Brinson discounted some vendor's lien notes and obtained other accommodations on perfectly legitimate transactions. It is also true that large payments were made by Brinson

from time to time toward the reduction of his line of indebtedness at the bank. Some of the money repaid the bank appears to have been won on gambling transactions. The chancellor allowed a recovery for various payments which Brinson made the bank at different times, and evidently upon the theory that these payments represent losses sustained by Brinson in playing the cotton market. The right to recover these sums must be based upon the express provisions of some statute. In our judgment the chancellor erred in awarding the complainant a decree for these sums of money. It might be observed, in passing, that the contracts entered into by Mr. Brinson in buying or selling cotton on the future market were entered into at New Orleans, La., through brokers doing an established business at that place, and the contracts appear to be valid under the laws of Louisiana. The bank did not make these contracts for Brinson, and in no wise represented him in negotiating for or concluding any of his trades.

This brings us to a consideration of the complainant's rights under sections 2300 and 2301 of the Code. The first of these sections (2300) renders absolutely void and unenforceable any contract "for the reimbursing or repaying any money knowingly lent or advanced for the purpose of . . . gambling, or to be wagered on any game, play, horse-race, cock-fight, or on any sport, amusement, pastime, or wager." This statute is about as drastic and far-reaching as language can make it. If we give to the words employed by the legislature their natural meaning, then the loans made by the bank to Mr. Brinson for the purpose of buying cotton futures could not be recovered at the suit of the bank, and the notes evidencing such loans are "utterly void." The door of the court would be closed to both parties to such transaction. Such of these loans as have been repaid by Brinson are closed transactions, and neither this section nor any subsequent section of the Code undertakes to grant to the wife the right to recover upon any such past

transaction. But the money which has not been repaid represents an illegal consideration, and if any part of such consideration is embraced in the mortgage here sought to be canceled, then complainant as the wife of the mortgagor has, under the express provisions of section 2301, the right to claim a forfeiture or cancellation of the mortgage. This section (2301) expressly and clearly provides that any mortgage, transfer, or conveyance given to secure or satisfy any money "loaned or advanced" for any "purpose mentioned in the last section, or any part thereof, shall inure to and vest in the wife and children of said mortgagor, . . . the whole estate, title, and interest of such person." It further provides that the interest or estate of the mortgagor shall vest in the wife and children "as though such person had died intestate." This section is likewise very drastic and severe, but, as stated by WHITFIELD, C. J., in *Viriden v. Murphy*, 78 Miss. 515, 28 So. 851, a case growing out of a bucket shop business, "We sit to administer the law as written, unswayed by sympathy." We think a material portion of the indebtedness representing money loaned for gambling purposes was renewed from time to time, and was carried forward in the present indebtedness secured by the mortgage executed by Mr. and Mrs. Brinson upon their homestead, and the illegal part of this indebtedness, like the fly in the ointment, taints the whole mass of indebtedness secured, and the interest of the mortgagor by force of the statute inures to the wife and children of Mr. Brinson, just as if he "had died intestate." It would be idle here to speculate just to what extent this statute does operate. The rights of Mr. and Mrs. Brinson, as between themselves, are not involved in the present case. Whatever right or interest Brinson attempted to convey to the bank by the mortgage inures to his wife and children; so far as this mortgage is concerned, Mr. Brinson is dead. It may be that the husband may experience some interest, as well as indulge in somewhat serious reflections,

in standing by and witnessing the devolution of his estate upon his wife and children, and seeing the court regard him dead. But forfeitures follow the gambler— forfeitures of property, friends, good health, and reputation. The design of the statute in question is to prevent this forfeiture from falling upon the innocent wife and children. Prior to the enactment of this statute it was a matter of common observation that losses sustained by the gambling husband frequently took away the shelter of the family home and left the wife and children without food or raiment. The design of the statute is to save to the innocent members of the family the community or family property wrongfully pledged as security for gambling transactions. The law denies the right of the money lender to furnish capital for unlawful business. The money changers have no more right to divert and prostitute the lawful capital of the country for such illegal purposes than has the individual the right to furnish the necessary firearms with which to commit murder. Money so loaned cannot be recovered, and the property of the husband, pledged to secure such money, immediately inures to and vests in the wife and children.

It is contended that Mr. Brinson had the right to buy cotton futures by mail or wire, as long as these contracts were consummated in Louisiana, and that money loaned for investment beyond the state would not come within the condemnation of the statute. We cannot so hold. As stated by McLEAN, J., in the opinion in *Ascher & Baxter v. Moyse & Co.*, 101 Miss. 36, on page 53, 57 So. 299, on page 304:

“It is true that an act of the legislature can have no extraterritorial force, and therefore can neither make unlawful a contract entered into upon the soil of another state, nor subject a party thereto to punishment, yet at the same time, in view of the well-settled public policy of this state, in contemplation of the growing and increasing evils of the traffic. both financial and moral,

it is unthinkable to believe that the legislature intended that the courts of this state should be thrown wide open, wherein the contracting parties should be given redress for the enforcement of such contracts when made outside of this state. There surely has been no change in the public policy upon this question, and certainly no developments in recent years which in the least commends this class or kind of dealing to the encouragement of either legislative or judicial bodies."

It is settled law that the contract for the purchase and delivery of a commodity in the future and for the payment of the difference in prices arising out of the rise and fall in the market above or below the contract price is a wager on the future price of the commodity, and is for that reason void when the real intent of the parties is simply to speculate on the rise and fall of prices, and the goods are really not to be delivered. The proof in this case is undisputed that Mr. Brinson was simply dealing in cotton futures in the ordinary sense of that phrase, and had no intention in the world to deliver any cotton. He was wagering or speculating on the rise or fall of the cotton market, and using his money expressly and avowedly for that purpose. The bank was fully cognizant of this purpose. The testimony of the cashier himself is conclusive against the bank on this point. It may be conceded that by the express provisions of chapter 118, Laws of 1908, none of the provisions of that act would apply to transactions by mail or wire between persons in this state and persons outside of this state, where neither is represented by a broker, agent, attorney, or intermediary in the transaction; but, while the provisions of the act of 1908 would not apply, the loaning of money for this purpose is condemned by section 2300 of the Code. This money is loaned by a Mississippi bank to a citizen of Mississippi, and the notes evidencing the loan are executed in Mississippi. It is immaterial that the money is to be wagered beyond the confines of the state. It is the policy of our

state to discourage speculation in futures and prohibit gambling of any kind or character. The temptations and the curse of these unlawful speculations have been fully commented upon in previous decisions of our court. Unfortunately the evil has not yet been fully suppressed. The curse is still blighting many an innocent home, and bringing to the innocent members of the family tears of sorrow and despair. That the buying of cotton futures is a wager has been expressly decided by our court in *Clay v. Allen & Co.*, 63 Miss. 426, *Campbell v. National Bank*, 74 Miss. 526, 21 So. 400, 23 So. 25. *Gray v. Robinson*, 95 Miss. 1, 48 So. 226, and *Ascher & Baxter v. Moyse & Co.*, *supra*.

It is not our purpose to disturb the findings of the chancellor on the facts. He gave, however, the wrong relief. He should have denied a recovery of the money paid the bank, but should have canceled the mortgage. It follows that the decree of the court below should be reversed, both on direct and cross appeal. The final decree awarding a momentary judgment in favor of the complainant will be reversed and vacated, and a decree entered here canceling the mortgage. The decree of the lower court, taxing appellants with the cost in that court, should not be disturbed; but the costs of this appeal should be borne equally by both appellants and cross-appellant.

Reversed on direct and cross appeal.

TURNER v. SOUTHERN RY. Co.

[73 South. 62.]

1. CARRIERS. *Personal injury. What law governs. Obstruction appearing on road. Negligence. Question for jury.*

Where plaintiff was injured in Tennessee by being struck by defendant's train while she was trying to flag the train, her right to recovery is based upon the precautionary statutes of that state.

2. RAILROADS. *Personal injury. Obstructions appearing on the road.*

Under the Tennessee statutes, Shannon's Code, section 1574, providing that every railroad shall keep its engineer, fireman, or some other person upon the locomotive always upon the lookout ahead, and that when any person or other obstruction appear upon the road, the alarm whistle shall be sounded, the breaks put down and every possible means employed to prevent an accident. Where plaintiff while standing on the railroad track with a lighted paper in her hand flagging the train was struck by a passing train, she was such an "obstruction upon the road" as required the precautionary measures prescribed by said statute.

3. SAME.

The court held that under the evidence set out in the opinion in this case a peremptory instruction for defendant was erroneous.

APPEAL from the circuit court of Alcorn county.

HON. CLAUDE CLAYTON, Judge.

Suit by Julia Turner against the Southern Railway Company. From a judgment on peremptory instruction for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Thos. Spight and W. A. McDonald, for appellant.

W. H. Kier and Earl King, for appellee.

HOLDEN, J., delivered the opinion of the court.

Julia Turner, the appellant, sued the Southern Railway Company in the circuit court of Alcorn county for damages for personal injuries alleged to have been caused by the negligence of the railway company, and from a judgment in favor of the appellee railroad she appeals to this court, and, among other errors assigned for reversal, she contends that the lower court erred in granting a peremptory instruction to the jury to find for the railway company. It appears from testimony in the record that Julia Turner, a negro woman, went to White, Tenn., a flag station on the defendant's railway, for

the purpose of boarding one of its passenger trains which passed there at four o'clock a. m. While she was there on the station platform she heard and saw the train approaching, and, in order to stop it so that she might get on, she stood on the track at the station where passengers get on and struck a match, lighting a piece of paper with which to flag the train, and while standing there with the lighted paper in her hand the train passed by the station at a rapid rate of speed, striking her and knocking her to one side, breaking her arm in three places, tearing the flesh therefrom, and injuring her otherwise. The speed of the train was not reduced, no alarm whistle was sounded, nor was there anything whatever done by the engineer to prevent the train from striking appellant. We quote here the testimony of appellant, and also that of John Toney, a witness who testified that he was present with appellant at the station when she was injured. Appellant testified:

"I went down to the depot that morning to get on the train 'The Newsboy,' and was standing right where they get on it and struck the match, and as I went to flag the train it ran right on up, and it just brushed by and hit me on the arm. Had made a light. The paper was burning, but the wind from the train blew it out. The train did not stop. It just brushed right on by. When I knowed anything to do any good, I was between Mr. Holloway's store and the steps. I was lying there where the train hit me, I suppose. The train hit me on my arm. It just deadened me all over. It broke my arm in three places and tore all this off. I can't get it up to my head; it draws back here. I suffer now, and have to take medicine all the time to keep the swelling down on this side."

We will say here that the doctor who attended appellant testified that she received the injuries complained of and was unconscious and in a comatose condition for about twelve hours after the injury.

John Toney testified:

"I was down there to go back to Moscow to work; was going back on the train we call 'The Newsboy,' about four o'clock in the morning. Plaintiff is the woman who was there that morning. She got a match from me and went to the track to strike the match, which she struck on the rail or the ties right on the side of the track; said she had to flag the train. She was on the track when she struck the match. The train was some one hundred and twenty-five or more yards away when she went to strike the match. Just as she got started up from the track the train ran up and blew her light out and the match she had struck, and she went across about ten feet just like I would throw my hat across to the wall. The train had given no signal for that particular station before it struck her. I heard the whistle, which seemed to be further down the road, but not at that place. It was so far down the road I could not tell how far it was, but I heard the whistle. It did not whistle or ring any bell for White station. It did not check its speed at all in passing White station that morning."

The appellee introduced E. O. Mays, the engineer of the train, as a witness in its behalf, and he testified that he was the engineer in charge of the engine on that occasion; that the train was going east and was due at White station at four-eleven a. m.; that his engine had a good electric headlight; that he gave the station whistle and whistled at a road crossing about three-quarters of a mile west of White station; that White station is a flag station; that he received no signal from the conductor or any one else to stop at White's; that he passed through White station on time, running about fifteen miles per hour, and that the station is right on the curve of the track which bends to the right, and with the train going east it throws the light from his headlight almost entirely on the left side where the passengers get on and where the appellant, Julia Turner, claims she was standing; that he was on the box on the engine and on the lookout, and saw no one at all; that no obstruction ap-

peared on or near the track at that place; that he made no effort to avoid striking appellant, as he did not see her. The conductor introduced by the appellee testified that he was looking out the window when the train passed White station, and that he saw no one there. With the above state of facts before the lower court the circuit judge granted a peremptory instruction to the jury to find for the defendant railway company; and the plaintiff below appealed here.

The appellant bases her right of recovery upon a violation of the precautionary statutes of Tennessee, which are applicable in this case, as the injury occurred in the state of Tennessee. We here quote the statutes (Shannon's Code) relied upon:

1574 (1166) 1298. "Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstructions appear upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

"1575 (1167) 1299. Failure to Observe Precautions.—Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur.

"1576 (1168) 1300. Observance of.—No railroad company that observes, or causes to be observed, these precautions shall be responsible for damages done to the person or property on its road. The proof that it has observed said precautions shall be upon the company."

It seems clear to us, from the testimony in this record, that the appellant, Julia Turner, went to the flag station White for the purpose of boarding the train, and attempted to flag it while she was standing on the track with the lighted paper in her hand. She pursued the only means she had of stopping the train at this flag station.

While she was standing on the track trying to flag the train she was struck by the engine and seriously injured. The testimony of appellant and the witness Toney, if it is believable, establishes the fact that the appellant appeared as an obstruction on the track when the approaching train was more than one hundred and twenty-five yards away, and she had a light in her hand, and should have been seen by the engineer in traveling that distance, one hundred and twenty-five yards, if he was "upon the lookout ahead." Furthermore, the engineer testified that he had a good electric headlight, and that on account of the curve in the track at that point the light was thrown from his headlight direct on the station premises where the appellant claims she was standing at the time she was struck. Now, if he had been "upon the lookout ahead" as required by law, he could have seen appellant when she appeared as an obstruction upon the track. We understand that the Tennessee courts have held that an "obstruction appearing upon the road," within the meaning of the statute, does not necessarily mean that the person or obstruction shall appear in the center of the track or between the rails, in order to become an "obstruction upon the road," but that when a person or object appears on the road, within the danger zone, or at a place on the road close enough to the track to be struck by a passing train, then the person or object does appear as an obstruction upon the road within the meaning of the law. Therefore, in the light of appellant's testimony, which shows that appellant was standing so close to the track as to be struck by a passing train, and that she appeared and was standing there at the time the approaching train was more than one hundred and twenty-five yards away, we must conclude that the appellant "appeared as an obstruction upon the road" and was injured by being struck by the train of the appellee.

The testimony of the engineer and conductor amounts to a denial that the appellant was there at the station or on the track or was in any way injured at all. The engi-

neer testified that he was on the lookout, but that he made no effort whatever to comply with the statute which required him to sound the alarm whistle, put the brakes down, and use every possible means to stop the train and prevent the accident, because he says that nothing "appeared as an obstruction on the road;" that he did not see the appellant nor any one else at the place where the appellant claims to have been injured; that no person was there on that occasion, and, in other words, the engineer says that the injury did not occur as claimed by the appellant. Of course, this a flat contradiction of the testimony offered by the appellant, and raises a sharp conflict in the testimony of the two parties to the controversy here; and this conflict in the testimony should have been submitted to the jury for their determination.

In view of these conclusions, we think the lower court erred in directing a verdict for the appellee, and the judgment of the lower court is reversed and remanded.

Reversed and remanded.

MARTIN v. STATE.

[73 South. 64.]

HOMICIDE. Instructions. Manslaughter. Evidence.

In a trial for homicide where the evidence was conflicting as to who was the aggressor in a fight during which one of the participants was killed by the other and the jury might have believed from the evidence that the killing was in the heat of passion, an instruction on manslaughter should have been given when asked for by the defendant and the failure in such case to give such instruction was reversible error.

APPEAL from the circuit court of Alcorn county.

HON. CLAUDE CLAYTON, Judge.

John Martin was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

J. M. Boone and Ely B. Mitchell, for appellant.

"The defendant in a criminal prosecution has a right to have the court instruct the jury on the law applicable to his contention, if supported by substantial evidence. However weak, unsatisfactory, or inconclusive it may appear to the court, to refuse to so instruct the jury would be to invade its province in the trial of a case. The question is not whether, in the mind of the court, the evidence, as a whole, excludes the idea that the defendant is guilty of an inferior degree of the offense charged, but whether there is any substantial evidence tending to prove any inferior degree of the offense. If there is, then the question of such degree should be submitted to, and left for the determination of the jury. The unsupported testimony of the defendant alone if tending to establish such inferior degree, is sufficient to require the court to so instruct." *State v. Buffington*, 66 Kan. 706, 72 Pac. 213.

"In the prosecution for murder whatever grades of the crime defendant's testimony may tend to prove should be governed by appropriate instructions, although his evidence may not be true." *State v. Richardson*, 92 S. W. 649, 194 Mo. 326. This same principle of law is sustained in the following cases: *State v. Fisher*, 59 Pac. 919, 23 Mont. 540; *Ringer v. State*, 85 S. W. 410, 74 Ark. 262; *Newton v. State*, 41 So. 19, 51 Fla. 82; *Trigo v. State*, 74 S. W. 546, 45 Tex. C. R. 127; *Boles v. Commonwealth*, 48 S. E. 527, 103 Vir. 816.

Judge STEVENS in rendering the opinion in the case of *Rester v. State*, 70 So. 881, uses the following language: "It is the province of the jury to pass upon the facts of a case and to believe parts of evidence of either side and discard any portion of the evidence either for the state or for the defendant. It is certainly the province of the jury also to settle any issue of fact in the case, but the defendant has the absolute right to have the facts of the case presented to the jury on instructions

which state them fully and accurately. The jury must apply the facts to the particular case in the light of and in accordance with the law of the case." *Rester v. State*, 70 So. 881.

The statutes of what constitute murder and manslaughter are so diversified that the court should give to the jury free latitude in determining these facts. "As a general rule it is always best to give both degrees of murder, no matter how atrocious the circumstances attending the homicide." *Barth v. State*, 39 Tex. Cr. R. 381, 73 Am. St. Rep. 935. "On the trial for murder the court should charge the jury as to what constitutes murder in the second degree though counsel for accused admit him to be guilty of that degree of crime, and if he is convicted of murder in the first degree in the absence of such charge his conviction should be set aside." *State v. Foster* (N. C.), 89 Am. St. Rep. 876. "The court should have given the charge asked, defining manslaughter." *Green v. State* (Miss.), 37 So. 646. "If a conviction of manslaughter would be correct should the jury accept one view of the evidence an instruction limiting the verdict to a conviction of murder or an acquittal is erroneous." *Johnson v. State of Miss.*, 75 Miss. 635, 23 So. 579.

"Where in a prosecution for homicide the evidence did not warrant a conviction for a higher offense than manslaughter it was error to omit to charge on manslaughter, though no such instruction was requested." *May v. State* (Miss.), 42 So. 164.

"Whether a defendant was guilty of manslaughter should be left to the determination of the jury although the evidence shows an unpremeditated killing by the defendant's brother in response to request of the defendant who had just been engaged in a fight, and was being held by two men, confronted by deceased armed with a stick to attack someone when he made the request." *Cook v. State of Miss.*, 85 Miss. 738.

“When two persons on a sudden quarrel engage in a mutual combat, and one is killed in the heat of the conflict the offense is at least manslaughter.” *State v. Davidson*, 8 S. W. 413, 95 Mo. 155.

Counsel for appellant have no intention to ask this court to reverse or overrule the cases of *Virgil v. State*, 63 Miss. 320, *Parker v. State*, 102 Miss. 113, and *Rester v. State*, 70 So. 881, for the facts in these cases shows clearly that the offense was murder or nothing. There is no evidence in any of these cases upon which a verdict of manslaughter could be based but the facts in this case make out an entirely different case to those referred to above. In the *Rester* case the contention of the appellant was that he was sitting on or near the east end of the bridge across alligator creek, facing west, when *Ladner*, coming down the creek, raised his rifle to shoot appellant; appellant threw his gun up and shot *Ladner* in self defense. This state of facts show that it was murder or nothing.

In the *Parker* case the facts are such as reported that it is impossible to get a clear cut idea of just how the tragedy took place.

In the *Virgil* case the only question to be decided was whether *Virgil* wilfully and feloniously burned the house which caused the death of the deceased. You may analyze and investigate the facts in the numerous other cases decided by this court upholding the same principles of law and you will not find in any of these cases facts similar to the case at bar where a combat was entered into by the parties at night in a crowd where the combat was fierce and of duration of three or four minutes, where the evidence is conflicting as to who began the fight, as to who was the aggressor from the beginning to the end.

“Whenever the life of a human being is in the balance, it is but just to him that the law governing the case made against him be properly stated.”

Strickland v. State of Miss., 85 Miss. 134. It was error for the court to refuse the charge of manslaughter when the records show so clearly that Walter Taylor was killed by John Barton in the heat of a combat. I give the following authorities which bear out my contention as to this charge of manslaughter: *Green v. State*, 37 So. 646; *Johnson v. State*, 75 Miss. 635; *Mays v. State*, 42 So. 164; *Cook v. State*, 85 Miss. 738; *Summer v. State*, 34 S. E. 293, 109 Ga. 142; *Dorsey v. State*, 35 S. E. 651, 110 Ga. 331; *Davis v. State*, 39 S. E. 906, 114 Ga. 104; *Horton v. State*, 47 S. E. 969, 120 Ga. 307; *State v. Buffington*, 72 Pac. 213, 66 Kan. 706; *Bollin v. Commonwealth*, 94 Ky. 391; *Greer v. Commonwealth*, 111 Ky. 93; *Strickland v. State*, 81 Miss. 134; *State v. Magers*, 57 Pac. 197, 35 O. R. 520; *Riley v. State*, 81 S. W. 711; *Lara v. State*, 89 S. W. 840; 48 Tex. C. R. 568; *Fuller v. State*, 95 S. W. 1099.

Lamar F. Easterling, Assistant Attorney-General, for appellee.

Counsel cites several authorities from this state to sustain his proposition that the manslaughter instruction should have been granted the accused. A reference to all the cases of this state cited by counsel will show that each case depended upon its own facts and that the facts in none of those cases are parallel with the facts now before the court. The cases cited were cases where the difficulty resulting in the killing originated suddenly between parties, and were cases where the heat of passion was aroused by sudden heated provocation.

As stated in the case of *Guice v. State*, a case very similar to this one on the facts where the point was made that the court refused to instruct on manslaughter; still others sought an enunciation of the law as to the crime of manslaughter, and were properly refused, because there was no element of manslaughter in the case. The killing was either murder or justifiable upon the ground

of self-defense. There can be no claim of legal heat of passion arising from the act of an enemy in making a supposed hostile demonstration.”

In the case of *Rester v. State*, 70 So. 881, in briefing that case I argued that Rester, according to his own evidence, unnecessarily shot the deceased at a time when his life was not in danger or apparently so, and that for this reason the jury would have been warranted in finding him guilty of the lesser crime on the ground that he shot from fear rather than from malice. This court however, held that there was no element of manslaughter in the case and that it was error to grant an instruction authorizing the jury to convict of manslaughter. Judge STEPHENS quotes from the case of *Bates v. State* to the effect that if the evidence for the state was the truth, the verdict should have been for murder and if the defendant's statement was truth the defendant should have been acquitted.

The rule announced in the *Parker case*, 102 Miss. 113, is the correct one and the one applicable to this case as said there, so we say here, that there is no halfway ground, no debatable question, except that of the appellant's guilt or innocence of the crime of murder and that to have given a manslaughter instruction under the facts of this case would not only have been improper but would have been manifestly erroneous. In this case, according to the state's evidence we have all the elements that usually attend a case of deliberate murder. We have a motive, a purpose on the part of the appellant to carry it into effect, threats made several days before evidencing such motive and purpose and the presence of the appellant at the scene of the homicide awaiting his victim who was expected in on the train to marry his sweetheart.

We therefore most respectfully submit that under the facts of this case, the authorities cited by appellant's counsel are not in point and that there was no error on

the part of the trial court in refusing the manslaughter instruction.

SYKES, J., delivered the opinion of the court.

The appellant, John Martin, in the circuit court of Alcorn county, was convicted of murder for the killing of Walter Taylor, and was sentenced by the court to imprisonment in the penitentiary for life, from which judgment this appeal is prosecuted. The testimony in the case for the state and the defendant was conflicting. The testimony of the state was to the effect that several months previous to the killing the appellant, John Martin, and the deceased had had a fight over a negro woman, in which fight the deceased cut the appellant several times with a penknife; that appellant had stated that he intended to kill deceased; that several days before the killing the defendant had sharpened up a long-bladed knife. The killing occurred at the Mobile & Ohio depot at Corinth about nine o'clock at night on the arrival of the south-bound passenger train. Just before the arrival of this train the appellant stated to one or two negroes that he was going over to the train and kill him a man. The testimony further shows that the appellant knew that the deceased was coming down on that train and was going to marry the woman about whom they had had the first difficulty and with whom the appellant seems to have been living at the time of the killing; that, in pursuance of this design, appellant met the train, and, as soon as the passengers had alighted therefrom, looked up the deceased and provoked the difficulty; that the deceased when he got off of the train had in his hand a stick made of a spike maul handle. It further shows that the deceased had heard of these threats against his life, and before the train arrived at Corinth had asked a white friend of his to get off the train with him and protect him, as John Martin had threatened to kill him on his arrival at Corinth. The

state placed upon the stand two negro witnesses who testified that the appellant walked up to the deceased, and after some few words struck the deceased; thereupon the deceased struck appellant on the head with the stick. The fight then proceeded, with the deceased backing away from appellant and striking appellant over the head with the stick while appellant was advancing on deceased hitting him. It being dark, the witnesses could not see that the appellant had a knife in his right hand and was cutting deceased. Shortly after the difficulty began appellant grabbed deceased by his belt with his left hand. The deceased continued to back, and the appellant to advance until the town marshal separated them. About that time the deceased dropped to the ground almost dead. An examination of his body showed that he had been cut or stabbed eight or ten times, principally on the right side from below the right arm to just above the hip. The town marshal testified that when he separated the combatants he remarked to the appellant, "I see you have killed a man," to which appellant replied, "That was what I intended to do."

The testimony of the appellant was that he went to the train to meet a friend; that he had no malice or ill will toward deceased. He denied having made any threats against the life of the deceased. He stated that when he saw Walter Taylor, the deceased, at the station, he spoke to him in a friendly way, and that Taylor told him to get on away from him or that he would kill him with that stick; that he turned to go away, when Taylor struck him over the head with the stick and knocked his hat off; that he then turned upon Taylor, and that Taylor continued to assault him with the stick, and that he then took his knife from his pocket and proceeded to cut and stab the deceased in self-defense; that all during the difficulty he was trying to back away from the deceased; and that the deceased was advancing upon him with the stick, striking him on the head with the same.

The testimony of all of the witnesses who saw any part of the fight both for the state and for the defendant is to the effect that Taylor struck the defendant a number of times with the stick. The head of the defendant was examined after he was placed in jail, and he had several bruises and abrasions on it where he had been struck by the deceased. Two negroes also testified for the defendant that Walter Taylor was the aggressor in the difficulty; that when the defendant spoke to Walter he then struck the defendant with his stick as testified to by the defendant. The defendant's witnesses also testified that the defendant was backing away from the deceased all during the difficulty, and that the deceased was pursuing the defendant, striking him with the stick.

In short, if the jury believe the testimony of the state and absolutely accepted its theory of the same and disbelieved entirely all of the testimony introduced for the defendant, then that testimony made out a case of murder. On the other hand, if they accepted absolutely the theory of the defendant based upon the testimony introduced by the defendant, then they would have been justified in believing that the defendant acted in self-defense and of returning a verdict of not guilty.

No manslaughter instruction was asked by the state, but one was asked by the defendant reading as follows:

"The court charges the jury that the killing of a human being, without malice, in the heat of passion, without authority of law, and not in necessary self-defense, is manslaughter, and if you believe from the evidence beyond a reasonable doubt that the defendant so killed Walter Taylor, you will find him guilty of manslaughter."

The court below refused to give this instruction, and we are asked to reverse the case for this reason.

The jury in this case were not compelled to believe all of the testimony introduced by the state and to disbelieve all of the testimony introduced by the defendant. They were not bound to accept either the theory of the

state or that of the defense as based upon the testimony. The jury are the sole judges of the facts in the case as testified to, and in arriving at their verdict it is wholly within their province to believe or disbelieve all or any part of the testimony where there is any contradiction in it. In this case the jury, had the manslaughter instruction been given, could have believed that the deceased was the aggressor in the difficulty, and they could also have further believed under this testimony that the appellant killed the deceased during the progress of this fight in the heat of passion, and not in necessary self-defense. A verdict of manslaughter would have been sustained by the testimony. The jury in this case could have found the defendant guilty of either murder or manslaughter, or could have acquitted him. Where the evidence is conflicting as to who is the aggressor in a fight during which one of the participants is killed by the other, a manslaughter instruction is proper. Under the testimony in this case it was error to refuse the manslaughter instruction asked by the defendant.

"There was not a charge given on either side as to manslaughter, and yet, on the proof, we think there might have been properly a verdict of manslaughter. We do not mean to say that a verdict of murder would be improper, on the testimony, if there had been no error of law; but, since a verdict of manslaughter might also be upheld, it was, in the distressingly conflicting state of the evidence, to the last degree important that no error of law should have been committed." *Johnson v. State*, 75 Miss. 635, 23 So. 579; *Green v. State*, 37 So. 646.

"Whenever the life of a human being is in the balance, it is but just to him that the law governing the case made against him be properly stated to the jury." *Strickland v. State*, 81 Miss. 134, 32 So. 921.

"It is the province of the jury to pass upon the facts of a case and to believe parts of the evidence of either side and disregard any portion of the evidence

either for the state or for the defendant. It is certainly the province of the jury also to settle any issue of fact in the case, but the defendant has the absolute right to have the facts of the case presented to the jury on instructions which state the law fully and accurately. The jury must apply the facts to the particular case in the light of, and in accordance with, the law of the case. If there is no element of manslaughter under the facts of the case, then there should be no instruction granted either to the state or to the defendant in reference to manslaughter." *Rester v. State*, 70 So. 881.

On the other hand, if there are any elements of manslaughter under any of the testimony in the case, then a manslaughter instruction is proper, and should be granted either to the state or to the defendant. *Echols v. State*, 70 So. 694.

Reversed and remanded.

HILL v. STATE.

[73 South. 66.]

1. CRIMINAL LAW. *Manslaughter. Venue. Sufficiency of evidence. Judicial notice. Municipalities. Existence and general course of railroads. Appeal. Reversal. Trial. Swearing jurors. Exception.*

The court held that under the facts of this case as set out in the opinion that the venue of the crime was established in Wilkinson county.

2. CRIMINAL LAW. *Judicial notice. Municipalities.*

Courts not only take judicial cognizance of municipalities but of the existence and general course of important railroads.

3. CRIMINAL LAW. *Appeal. Reversal. Proof of venue.*

Under Code 1906, section 1401, providing that doubt as to the county in which the offense was committed shall not avail to

Statement of the case.

[112 Miss.]

procure acquittal, the supreme court is precluded from reversing a case even though the evidence leaves the venue in doubt.

1. CRIMINAL LAW. *Trial. Swearing jurors.*

The failure to specially swear the jury in a capital case, as required by Code 1906, section 1483, was not a jurisdictional defect and must have been taken advantage of before verdict as provided by section 1413, Code 1906, and where a defendant accepted the jury and went to trial on the facts without exception on this ground, such exception could not be first made in a motion for a new trial, since section 4936, Code 1906, provides that no judgment shall be reversed for any defect which might have been taken advantage of before verdict, and which was not then urged.

APPEAL from the circuit court of Wilkinson county.

HON. R. E. JACKSON, Judge.

Hattie Hill was convicted of manslaughter and appeals.

Section 1401 of the Code of 1906, referred to in the opinion, provides that:

"The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where the offense was committed. But, if on the trial the evidence make it doubtful in which of several counties, including that in which the indictment alleges it, the offense was committed, such doubt shall not avail to procure the acquittal of the defendant."

Section 1483 provides:

"The jurors in a capital case shall be sworn to 'well and truly try the issue between the state and the prisoner, and a true verdict give according to the evidence and the law'; and bailiffs may be specially sworn by the court, or under its direction, to attend on such jury and perform such duties as the court may prescribe for them."

Section 4936 provides that:

"A judgment in a criminal case shall not be reversed because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present . . . during the trial or any part of it,

or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, or because of any error or omission in the case in the court below, except where the errors or omissions are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court."

Bramlett & Bramlett, for appellant.

The state did not attempt to prove venue, Wilkinson county, in which the indictment charges this homicide was committed, is nowhere mentioned in the Record.

In *Thompson v. State*, 51 Miss. 353, on page 356, the court said: The record does not show that the offense was committed in the county where the trial was had. This was essential. Const., art. 1, sec. 7. The court erred in not arresting the judgment, for which judgment is reversed and defendant discharged." This section of the Constitution of 1869 is brought down and incorporated in section 26, article 3 of the Constitution of 1890 which is as follows:

Section 26. In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or the crime against nature the court may, in its discretion, exclude from the court room all persons except such as are necessary in the conduct of the trial.

In *Vaughan v. State*, 3 Smedes & M. 553, p. 554, the court said: "It is scarcely necessary to add, that the offense must be proved to have been committed in the

county, as charged in the indictment, in order to bring it within the jurisdiction of the court."

In *Green v. State*, 23 Miss. 509, p. 531, the court said: "And after a careful examination, we find no proof that the offense of which the prisoner was convicted, was perpetrated within the county of Marion, as alleged in the indictment.

This proof was essential. 1 Ph. Ev., 515; 3 ib. 703, n. 381. The prosecution, from inability or inadvertence, having failed to produce it, the finding of the jury and the judgment of the court were void."

To quote Bishop's Criminal Evidence, Pleading and Practice (2 Ed.), vol. 2, section 1355, 3: "The venue must appear, showing the offense to have transpired in a place over which the court has jurisdiction."

On page 6 of the record it appears this homicide occurred in Centerville, Miss. In the *Elzey case*, 70 So. 579, Judge POTTER, holding that a court cannot take judicial notice of a supervisor's district said: "The districts of a county are determined by order of the board of supervisors of the county, and by such order may be changed by Board of Supervisors of Sunflower County, 70 So. 742. This reasoning applies with the same unanswerable force to municipalities in certain counties because the municipal authorities are authorized by section 3301 of the Code to change the boundaries of a municipality, and of course they may at any time take in territory lying in more than one county. This particular case is a striking illustration. The court cannot take judicial notice that Centerville is in Wilkinson county because it is not entirely. If the court should take judicial notice that Centerville is in Wilkinson county, it would also have to take judicial notice that Centerville is in Amite county, the municipal boundaries embracing territory in both counties. Failure to prove venue may be assigned on appeal. *Quillen Case*, 106 Miss. 831; *Cagle case*, 63 So. 672.

2. JURY NOT SWORN.

Section 1483 of the Code of 1906, provides: "The jurors in a capital case shall be sworn to "well and truly try the issue between the state and the prisoner, and a true verdict give according to the evidence and the law;" and bailiffs may be specially sworn by the court, or under its discretion, to attend such jury and perform such duties as the court may prescribe for them."

This statute was ignored in this case. Every prisoner at the bar in a capital case is entitled to the protection that this statute affords in having the jury sworn as above provided for. It is his inalienable right to have the jury impressed with the solemnity and importance of a trial where a man's life or his liberty is at stake. The state's usual haven of refuge, section 2718 of the Code of 1906, can avail nothing in this case, because it provides that a jury shall be deemed a "legal jury after it shall have been impaneled and sworn."

Ross A. Collins, Attorney-General, for appellee.

The first of the three errors alleged relates to the alleged failure of the state to show that the homicide occurred in Wilkinson county. The evidence shows conclusively that the cutting was done in the town of Centerville. The court may properly take judicial notice that Centerville is in Wilkinson county and the court may take judicial notice of this law of the state of Mississippi. Wharton, Criminal Evidence p. 594, 309d. It may be that the town has since elected to come under the Code provisions in regard to municipalites and thereby be enabled to extend its municipal limits as therein provided. It is alleged by appellant's counsel that the boundary lines of the municipality have been so extended so as to include a part of Amite county. If these be the actual facts the contention of appellant's counsel may have some force.

The next contention is that the jury was not sworn in accordance with section 1483 of the Code of 1906. The evidence shows that the jury in this case were composed of the regular juries numbers one and two, drawn for the week, and that they were sworn when drawn. None of them being *tales* jurors.

Section 1413 of the Code of 1906, provides as follows: "A person shall not be acquitted or discharged in a criminal case, before verdict, for any irregularity or informality in the pleadings or proceedings; nor shall any verdict or judgment be arrested, reversed, or annulled after the same is rendered, for any defect or omission in any jury, either grand or petit, or for any other defect of form which might have been taken advantage of before verdict, and which shall not have been so taken advantage of." See also section 4936 of the Code.

The objection that the jury was not sworn cannot be first raised in the supreme court in a criminal case. *Alexander v. State*, 22 So. 871.

It will be presumed that the jury in a criminal case was sworn in the absence of an affirmative showing to the contrary. *McFarlan v. State*, 70 So. 563. The testimony in the circuit court shows in this case that the jurors were sworn when the juries were drawn at the beginning of court, and the record shows conclusively that no objection was made to them until after the verdict.

It is true that section 1483 prescribes a certain oath to be taken by jurors in a capital case, but I submit that the failure to administer this oath can be made the subject of waiver and consequently under sections 1413 and 4936 of the Code of 1906, the appellant cannot complain after the verdict has been rendered. If the jury had been sworn at the beginning of the term of court it constituted a legal jury as far as any constitutional requirements are concerned, and the failure of appellant to interpose an objection before verdict cannot avail him anything upon appeal, as the special oath is not so jurisdictional in its

nature as to preclude the application of the above statutes.

STEVENS, J., delivered the opinion of the court.

Appellant was indicted for the murder of one Davis Lyons, convicted of manslaughter, and sentenced to the penitentiary for a term of three years. There are only two points raised by the assignment of errors that merit discussion. The first point is the contention that the state failed to prove the venue; and the second point is the complaint that the petit jury was not specially sworn in accordance with the provisions of section 1483, Code of 1906.

The witnesses for the state, in detailing the facts, nowhere mention Wilkinson county. There is abundant evidence, however, that the crime was committed in Centerville, Miss. The undisputed evidence also shows that the scene of this tragedy was on the track of the Yazoo & Mississippi Valley Railroad Company, "at the north end of the depot, going up the track." Witness Murry Feltus, who was with appellant at the time she cut or stabbed the deceased, says that Davis Lyons, the deceased, overtook them "when we got up to the other end of the depot, going up the track." We quote further from his testimony the following:

"Q. Where did this take place? A. At the north end of the depot, going up the track. Q. How far from Mr. Ford's store? A. It was west of the store. Q. About how far is it from the corner of Ford's store to the depot? A. I guess about thirty or forty yards. Q. From the front of the store to where she was? A. Yes, sir. Q. You state you and Hattie were north of the depot in Centerville? A. Yes, sir; going up the track."

The defendant was introduced as a witness in her own behalf, and stated, among other things, that she, in company with Murry Feltus, came across by Hughes' store, up the railroad track, going home, and that when she

first heard from the deceased she was about a block and a half up the track. Then follows the following question and answer:

“Q. What happened then? A. I was at the upper end of the depot, when he called me, and I answered him, but did not hesitate in my walking. He caught up with me, and said, ‘Hattie.’ I said, ‘What?’

And on cross-examination she states that the altercation took place by the side of the railroad track, when deceased overtook them; that it was on the same side of the track next to the depot; and that deceased, at the time, was between her and the depot. The evidence, then, in our judgment, clearly shows that the fatal stab was given the deceased in a fight occurring on the railroad right of way in the town of Centerville, and within sight of the depot and some of the stores of that municipality; that the deceased, after receiving the mortal wound, betook himself to one of the drug stores for examination and treatment, and was attended by a physician who lived in Centerville. The evidence quoted, in connection with the other evidence in the case, fixed, beyond doubt, the scene of the tragedy. Courts not only take judicial cognizance of municipalities, but of the existence and general course of important railroads like the one here running through the municipality of Centerville. But even if the evidence left the venue in doubt, we would be precluded from reversing this case on that ground by section 1401, Code of 1906.

A special venire was not asked for or used in the trial of this case. The jury was accepted from the regular panel. It was contended, on the motion for a new trial, that the jury was not specially sworn, as required by section 1483 of the present Code. Conceding that the proof shows the irregularity complained of, this error, under the provisions of sections 1413 and 4936 of the Code, cannot now be availed of by the defendant. It is a “defect or omission” in reference to the petit jury “which might have been taken advantage of before ver-

dict" and which was not taken advantage of. Looking to section 4936, we are convinced that this error or omission was not jurisdictional in its character, and was not made the ground of special exception at the proper time. The defendant permitted the jury tendered her to be accepted, and a trial on the facts had without calling the court's attention to the apparent oversight in not having the jury specially sworn. Not until after the verdict is returned and there is a motion for a new trial is any complaint made of this omission. We are constrained to hold that special exception in the instant case should have been reserved or made at a time when the lower court could have corrected the error. This holding finds support in *Alexander v. State*, 22 So. 871, *Hays v. State*, 96 Miss. 153, 50 So. 557, and *Boroun v. State*, as reported on suggestion of error, 105 Miss. 887, 63 So. 297, 457.

There is no material error in the instructions, or any other ruling of the court complained of. There is evidence sufficient to warrant the conviction for manslaughter.

Affirmed.

THOMPSON, AUDITOR OF PUBLIC ACCOUNTS ET AL. v. McLEOD.

[73 South. 193.]

1. TAXATION. *Equality. Property tax. Constitutional provisions.*

Chapter 110, Laws 1914, entitled, "An act to levy, collect and enforce the payment of an annual privilege tax or occupation fee upon all persons, associations of persons, or business firms and corporations, pursuing the business of extracting turpentine from standing trees" and fixing the tax at one-fourth of one per cent each year for each cup or box, is a property tax and not a privilege tax, and is violative of Constitution 1890, section 112, providing that taxation shall be uniform and equal throughout the state, and that property shall be taxed in proportion to its value.

Statement of the case.

[112 Miss.]

2. TAXATION. *Property. Turpentine leases.*

A turpentine lease is a thing of value—"property" upon the value which the state can levy an *ad valorem* tax.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Bill for injunction by A. J. McLeod against Duncan Thompson, auditor of Public Accounts to the State of Mississippi, and the treasurer of the state. From a decree for complainants, defendants appeal.

Appellants are, respectively, auditor of public accounts and treasurer of the state of Mississippi, and prosecute this appeal from a decree of the chancery court of Hinds county, Miss., overruling their demurrer to a bill of complaint filed by appellee to restrain these officials from levying and assessing the tax attempted to be imposed by chapter 110, Laws of 1912, being "An act to levy and collect and enforce the payment of an annual privilege tax or occupation fee upon all persons, associations of persons, or business firms and corporations, pursuing the business of extracting turpentine from standing trees." Appellee is a resident and citizen of Hancock county, Miss., and engaged extensively in the turpentine business. His bill of complaint is very lengthy, and it is unnecessary to set out the averments thereof in full. The material facts alleged are that complainant is the owner of several turpentine distilleries, and was, during the year preceding January 1, 1913, engaged in the extraction of sap and resin from a large number of pine trees and transporting the same to his distilleries and then and there distilling the crude gum or resin into the manufactured product called "turpentine"; that he was operating seventeen crops of turpentine on the trees, describing in Exhibit A and A 1 to the bill, consisting of one hundred and seventy thousand boxes; that the land shown in Exhibit A belonged exclusively to the complainant, while the trees standing upon the lands described in Exhibit A 1 were

leased to the complainant for the purpose and with the right to extract the crude turpentine; that the timber upon all of the lands mentioned had been duly assessed for *ad valorem* taxes and taxes paid thereon; that in extracting resin from trees the so-called turpentine crops last usually about three years and during the first year about fifty per cent. of the entire value of the use of the sap is extracted, about thirty per cent. the second year, and twenty per cent. the third year, and that after the third year the trees are generally of no value for the purpose of extracting resin, but that complainant, however, was operating about two crops tapped or cupped four years ago; that five crops were operated by complainant for the first time, five crops the second year, five crops the third year, and two crops the fourth year; that complainant in operating turpentine distilleries in the state of Mississippi was already paying a privilege tax for the right so to do and in accordance with the statutes of this state. The bill then charges that chapter 110, Laws of 1912, attempting to impose a so-called privilege tax for the right to extract turpentine from standing trees, is unconstitutional and void for many reasons therein alleged, one of which is that the enforcement of the provisions of said act would contravene section 112 of our state Constitution, the contention being that the tax here attempted to be imposed is a property tax and not a privilege tax, and, being a property tax, it is not equal and uniform.

Section 1 of the act in question is as follows:

"Be it enacted by the legislature of the state of Mississippi, that there is hereby levied on the gross annual cutting or extraction the following annual privilege tax or occupation fee for the year 1912, and for each subsequent year, upon each person, association of persons, or business firms and corporations, pursuing the business of extracting turpentine from standing trees.

"That for carrying on the business of extracting turpentine from standing trees the license shall be one-

fourth ($\frac{1}{4}$) of one cent each year for each cup or box."

Other sections of this act require sworn statements to be made to the auditor by all persons, firms, and corporations affected by the act; these sworn statements to be rendered on or before the 1st day of February for the year ending December 31st next preceding. The statement required is "a sworn statement of the total extracting of turpentine." A penalty is imposed for failure to pay the tax, and the state treasurer is authorized to distrain the goods and chattels belonging to the person, firm, or corporation in default and to sell a sufficient amount of the property of the taxpayer at public vendue to pay the taxes, together with ten per cent. thereon for each month for which the taxes remain unpaid; the moneys collected to be placed in the treasury to the credit of the general revenue fund of the state.

Geo. H. Ethridge, Assistant Attorney-General, for appellants.

Green & Green and Jas. R. McDowell, for appellees.

STEVENS, J., delivered the opinion of the court.

It is conceded by counsel for the state that, if the tax here attempted to be imposed is a property tax, the act imposing it is unconstitutional and void. In following the rule, so frequently announced by the courts, of looking through the form to the substance, it is manifest that the tax exacted by the act under review operates, and can only operate, as a property tax and is really not a privilege tax. We are not called upon to place any limitation upon the right of the state to exact licenses or impose privilege taxes that are really such and to require the taxes as a condition precedent to the right to do business within the confines of our commonwealth. We do not question the right of the state, also, to measure a privilege tax by the volume or amount of business done. The act here assailed does not even attempt to

require a license or permit to be issued by any officer or department of the government as a condition precedent to the right of a citizen to extract crude turpentine from pine trees. No document of any kind is to be issued in advance. The tax demanded by the act is to be paid at the end of the year and after the resin is extracted—after the so-called privilege has been exercised. On default by the taxpayer, payment of the tax is enforced by seizure and sale of any property belonging to the defaulter. The enforcement of the tax conforms to the procedure adopted for the enforcement of *ad valorem* taxes. The act under review does not levy a privilege tax on the right or privilege of selling resin or the gum of the tree as originally extracted and commonly known as “crude;” but the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees to “extract turpentine from standing trees.” Section 1 of the act makes no effort to conceal the subject-matter of the tax. It expressly declares that it is “levied on the gross annual cutting or extraction,” and the tax levied is “one-fourth of one cent each year for each cup or box.” It is true the act in other language refers to it as a business—“a business of extracting turpentine from standing trees.” The imposition of such a tax is not on a business, but on the property involved. Here we have a citizen of our state who owns and operates his own turpentine distilleries, who owns the pine trees which produce the resin, the crude product, without which his distilleries cannot be operated, and although he pays *ad valorem* taxes upon his land and standing trees at their true value, and although he pays a privilege tax for the right to manufacture spirits of turpentine from the annual product of the trees, he is now called upon to pay an additional tax of one-fourth of one cent on each box cut or chopped on the trees, and it requires no refinement to observe at once that this is an additional burden of taxation operating, not indirectly,

but directly upon complainant's property. Here the legislature attempts to say to the citizen:

"Although we recognize that you are the lawful lessee or owner of standing pine trees which produce when tapped an annual product of resin, and although we have demanded and you have paid your full share of taxes upon these standing pine trees and the soil which continually feeds them, nevertheless, thou shalt not lay ax to the tree to extract the natural gum without subjecting any property which you have in the state of Mississippi to an additional tax of one-fourth of a cent for each box you cut."

This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from his pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead. As stated, the levy is not imposed for the right to sell crude turpentine. If this were done, then any one engaged in the regular business of buying and selling crude gum might be liable. The writer is not disposed to commit this court to any unnecessary process of reasoning in this opinion, but having been born and reared amongst the tall, long-leaf pines of South Mississippi, is familiar therefore with the turpentine business and feels safe in asserting that there is no well-defined business of buying and selling the crude turpentine. It is true that many individuals tap their own trees and sell the annual crude product to the distilleries. It is also true that the owner of the turpentine distillery, more familiarly known as the "still," frequently leases standing timber for the express purpose of boxing the trees for turpentine. In doing so, however, he is the owner either of the timber or of a valuable lease, generally referred to as a turpentine

lease. It has been expressly decided by this court that a turpentine lease is a thing of value—"property," upon the value of which the state can levy and does levy an *ad valorem* tax.

The nature of this lease was properly characterized by our court in *Naval Stores Co. v. Adams*, 104 Miss. 392, 61 So. 417. In the language of the opinion by REED, J., the court says that:

"The leases give the appellant the right to extract the crude gum from the pine trees, and then thereafter such product is manufactured in Harrison county into turpentine and resin."

And in *Jones v. Adams*, 104 Miss. 401, 61 So. 420, the court, again speaking by REED, J., says:

"The question before us is whether such turpentine lease is personal property, subject to taxation. It is understood that the lease gives a . . . privilege to enter upon land for a term and extract the gum or crude products from the pine trees, which is afterwards manufactured into what is known as naval stores. . . . Now, is it not property? It is subject to ownership, it has a value, and it may be bought and sold. It seems clear to us that it is property. From its very nature it is personal property. The lease, or right, or privilege, which is owned by appellant, being personal property, is subject to be taxed as such."

There can, then, be no such thing as a valid and lawful turpentine lease without the right to extract the crude gum; and the case therefore falls clearly and squarely within the principle recently announced by this court in the companion case of *Duncan Thompson, Auditor, et al. v. A. L. Kreutzer et al.*, No. 18,249, 72 So. 891, wherein our court, by Chief Justice SMITH, observes that:

"A tax on an essential attribute of a thing is a tax on the thing itself," and "no tax can be imposed on the right of ownership which is not also a tax on property."

As stated by Chief Justice MARSHALL in *Brown v. Maryland*, 12 Wheat. 444, 6 L. Ed. 687:

"All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

And subsequently, in the case of *New York v. Wells*, 208 U. S. 21, 28 Sup. Ct. 193, 52 L. Ed. 373, the rule was again declared by the supreme court of the United States, with reference to imports:

"That a state cannot, in the form of a license or otherwise, tax the right of the importer to sell."

In *Brushaber v. Railroad Co.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, the supreme court of the United States, discussing the right of the Federal government to levy a direct tax without an apportionment, observes with reference to a tax on income and property:

"Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things, it was direct on property in a constitutional sense, since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived, and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent."

So likewise in *Pollock v. Trust Co.*, 157 U. S. 558, 15 Sup. Ct. 680, 39 L. Ed. 811, the court, by its Chief Justice, well says that:

"A tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes," and "an annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice PATER-

SON observed in *Hylton v. United States*, 3 U. S. (3 Dall.) 171, 1 L. Ed. 556, 'Land, independently of its produce, is of no value.' "

In the language of the distinguished Coke:

"What is land but the profits thereof?" Co. Lit. 45.

"A devise of the rents and profits or income of lands passes the land itself both at law and in equity." 1 Jarman on Wills (5th Ed.), 789, and cases cited.

Following the reasoning of this court in *Thompson et al. v. Kreutzer et al.*, *supra*, there cannot be such a thing as a turpentine lease without an owner or lessee. If, then, you tax the lease itself with an *ad valorem* tax and at the same time exact tribute from the lessee in laying the ax to the tree, it is a case of double taxation pure and simple. There cannot be ownership of standing pine trees without an owner, and if you tax the standing trees with an *ad valorem* tax, and at the same time exact tribute from the owner as a condition precedent to his right to lay hands upon the tree, the state is imposing double taxation upon the tree itself. Section 112 of our Constitution solemnly declares that "taxation shall be uniform and equal throughout the state," and that "property shall be taxed in proportion to its value." If the tax here questioned can lawfully be imposed, then the legislature of our state in a desperate search for revenue can effectually brush aside the essential feature of equality and uniformity demanded by the Constitution. The provision that property shall be taxed in proportion to its value would be nullified, and the integrity of the Constitution itself destroyed. The legislature is here attempting to denominate private use of property as a public use. Appellee, in taking crude gum from his own trees, is not directly engaged in any kind of mercantile business. He does not bring his wares into the market place nor upon stock markets. He is upon his own private property pursuing a natural right.

"A legislature cannot make a private purpose a public purpose, or draw to itself or create the power to

authorize a tax or a debt for such a purpose, by its mere fiat." *Dodge v. Township*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242.

This case, while different from, falls within the principle announced by our court in *Wilby v. State*, 93 Miss. 769, 47 So. 465. At page 772 of 93 Miss., at page 466 of 47 So. our court says:

"Laws of this nature approximate an abridgment of the liberty of the citizen guaranteed to him by the Fourteenth Amendment of the Constitution of the United States, and should receive the strictest construction. Liberty, in its broad sense, must consist in the right to follow any of the ordinary callings of life without being trammelled."

The act under review does not undertake to make a distinction between the humble homesteader who taps a few trees by his own home and the large operator of many distilleries. No distinction can in fact be made. The liability here imposed is conclusively fixed at the root of the tree, and not at the market place. The poorest and most humble homesteader in the country might tap a few trees on his forty acres, load a few barrels of crude turpentine, convey it to the distillery with a one-ox cart, and thereby subject himself to liability.

The conclusion of the whole matter, then, is that this tax operates necessarily and immediately as a property tax and not as a privilege tax, and the statute imposing it violates section 112 of our Constitution, and the result reached by the learned chancellor is eminently correct, and his decree is, accordingly, affirmed.

Affirmed.

POTTER, J. I dissent from the majority opinion in this case. The statute under consideration puts a privilege tax on those engaged in the business of extracting turpentine from standing pine trees. The majority opinion in this case says that the statute is a "property tax" and does not put the tax in question

on the business of extracting crude turpentine, but the statute, in plain English, says it does.

The majority opinion in this case says that the act under review does not levy a privilege tax on the right or privilege of selling resin, or the gum of the tree as originally extracted and commonly known as "crude." The tax, however, is upon those engaged in the business of extracting crude turpentine; and to engage in a business is to engage in an occupation for profit; and how else is a man who is engaged in extracting turpentine from trees to obtain a profit therefrom except by a sale of his products, either in its crude form or as a more highly manufactured article. * The opinion in this case says that the tax in question is a tax on property. But the statute says that it is a tax upon the persons engaged in a particular line of business. That this tax is a tax on business, and not on the property, is demonstrated by the fact that the tax imposed is not a lien on the property used in the business, and, if the business is carried on by another than the owner of the land, the owner is not personally liable for the tax.

It is said in the majority opinion that the defendant in this case has paid an *ad valorem* tax on his property, as the standing pine trees are part of the land and he has paid a tax on the land. That is true, but it does not prevent the state from imposing a privilege tax on persons engaged in a business for profit and using in their business the property taxed. Every merchant in the state pays an *ad valorem* tax on his stock of goods, but this does not exempt him from paying a privilege tax to sell the same goods. The owner of a cart pays an *ad valorem* tax on his cart, and, if he owns a mule, an *ad valorem* tax on his mule. He can use the cart and mule for his own purposes without paying a privilege tax on same. But if he uses this same cart and mule as a public dray for profit, he is required to pay a privilege tax. The statute in this case provides that the tax is upon the business of extracting crude turpentine.

It is a revenue measure pure and simple, and the said tax is, in no sense, a tax on the property itself.

I know of no way to construe an unambiguous statute except by its plain terms. I take it that this statute means what it says, and its purposes could not be put in clearer language. The tax is on the occupation of "pursuing the business" of extracting turpentine from standing trees. The statute is designated a privilege tax in its title. I know of no good reason why every other occupation, from telling fortunes to running a railroad, can be taxed as a privilege, and the extensive business of extracting resin from pine trees cannot be so taxed.

The fact that this tax is measured by the number of trees taxed does not make the act invalid; for this only fixes the measure or the *quantum* of tax, just as the amount of stock carried in a grocery store fixes the amount of privilege tax to be charged; or the capacity of a press in an oil mill fixes the privilege tax to be charged upon the cotton-seed oil business.

Cook, J., joins in this dissent.

LEVERETT v. STATE

[73 South. 273, Division B.]

1. CRIMINAL LAW. *Trial. Court's remarks in selecting jury. Homicide. Admissibility of evidence. Previous uncommunicated threats by decedent. Previous communicated threats. Self defense. Circumstances preceding act. Instructions. Weight of evidence. Ignoring defendant's version.*

Where on a trial for homicide the whole trend of the *voir dire* examination was to influence the proposed jurors against the

defendant and to strongly impress them with the idea that their duty was to convict; and each juror was given to understand that he would be a man of very little moral courage unless he found a verdict of guilty, such an examination was erroneous and very prejudicial to the defendant.

2. **HOMICIDE.** *Admissibility of uncommunicated threats by decedent.*

It was prejudicial error on a trial for homicide, to exclude testimony of uncommunicated threats by decedent against accused where accused claimed to have acted in self defense, since such threats indicated the feeling of deceased toward accused.

3. **SAME.**

It was also prejudicial error to exclude testimony by the deceased towards accused where such threats had been communicated to accused before the killing.

4. **SAME.**

Where there was evidence that decedent had made threats against accused at a certain place, it was prejudicial error to exclude corroborative evidence that deceased was in fact, at the time mentioned, at such place.

5. **HOMICIDE.** *Admissibility of evidence. Self defense.*

Where accused claimed he killed deceased in self defense in a quarrel, over deceased's improper relations with defendant's wife, it was prejudicial error to exclude the wife's testimony that she had written a letter found by accused on the person of deceased, since such evidence had a tendency to prove the corroborative circumstances of the defense genuine.

6. **HOMICIDE.** *Admissibility of evidence. Self defense. Circumstances preceding the act.*

Where on a trial for homicide accused claimed he killed decedent in self defense, it was prejudicial error to admit evidence that the night before the killing some one wearing clothes similar to accused's was seen watching the mill where deceased worked, where there was no further identification.

7. **CRIMINAL LAW.** *Instructions. Weight of evidence.*

Where on a trial for homicide accused claimed he killed deceased in self defense in a quarrel over deceased's improper relations with accused's wife, an instruction to the jury for the state, to disregard the finding of a letter from accused's wife on decedent's body, was prejudicial error, because on the weight of evidence and because such evidence was important and material evidence as corroborative of defendant's claim of self defense.

8. INSTRUCTIONS. *Self defense. Ignoring defendant's version.*

Where on a trial for homicide, defendant testified that he shot deceased in self defense, but did not know the position of deceased when he fired the last three times because of the smoke. In such case an instruction to find the defendant guilty if he fired after deceased turned his back, and while defendant was in no real or apparent danger at his hands, was prejudicial error as ignoring defendant's version of the shooting and of what occurred at the time.

9. CRIMINAL LAW. *Institutions. Self defense. Undue prominence.*

Where on a trial for homicide the accused depended alone on the ground of self defense, instructions emphasizing the fact that no other defense was involved, were erroneous as disparaging the testimony regarding the cause of the quarrel.

10. HOMICIDE. *Instructions. Self defense.*

On a trial for homicide where defendant claimed to have acted in self defense, it was prejudicial error to refuse an instruction for the defendant, that the jury might consider a previous threat by decedent to kill accused the next time they met.

11. HOMICIDE. *Instructions. Self defense.*

In a trial for homicide where accused defended on the ground of self defense, it was error for the court to refuse the defendant an instruction, that a man about to be assaulted with a deadly weapon is not required by the law to wait until his adversary is on equal terms with him, but may rightfully anticipate his action and kill him when to strike in anticipation reasonably appeared to be necessary to self defense.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Thomas H. Leverett was convicted of murder and appealed. The facts are fully stated in the opinion of the court.

E. E. Rose, Currie & Currie and J. W. Cassedy, for appellant.

If the jury believed the appellant went up to Richton Mill on the night just previous to the shooting, looked into the mill and saw Bradley, the deceased, while he was engaged about his work, in the face of his denial, this would go a long ways toward convincing them that

appellant's business in Richton was to look him up and kill him. It was on this theory that the evidence was offered and on this theory that it was allowed by the court. For the present purposes we assume that it will be agreed that the intent and purpose of the evidence was material, and that it was received, and materially aided the state in securing a conviction.

The only question then left to consider was the court in error in allowing this testimony to go to the jury? The objection to the testimony was that it was not sufficiently shown that the appellant was the person the witnesses were saying that they saw looking into the Richton mill window. We contend that before this evidence should have been allowed to go to the jury the state must have made out at least a *prima facie* case of the defendant. We readily agree that the identity of a person may be shown in many ways, but our contention in this case is, it must be shown in some way. Just suspicion or inference, or probability certainly would not be sufficient. (Wigmore on Evidence, sec. 411-412-413, and *State v. Alton*, 105 Minn. 410, 15 Am. & Eng. Ann. Cases 806.)

Second. The court erred in ruling out the testimony of Dr. W. W. Weathersby, Mrs. T. H. Leverett and S. W. Wilkerson. (Under this heading assignments number 8-9-10-11-12-13-14 and 15 will be included.)

We contend that however strong the case may be for the state, the defendant was entitled to have his version of the case submitted to the jury, even though his version of the case was supported by his testimony alone. This identical question was before the court in the case of *Harris v. State*, 72 Miss. 99.

This court also in the case cited below has held that when evidence has been offered tending to prove that the deceased was the aggressor, even though there may be a conflict of testimony on the point, evidence of previous though uncommunicated threats is to be admitted as supporting the other evidence. See *Johnson v. State*,

64 Miss. 430; *Guice v. State*, 60 Miss. 714; *Hawthorn v. State*, 61 Miss. 749; *Johnson v. State*, 66 Miss. 189; *Echoles v. State*, 55 So. 485; *Bell v. State*, 66 Miss. 192; *Miles v. State*, 54 So. 946; *Prime v. State*, 73 Miss. 838.

The testimony of Wilkerson was admissible on two theories, first, it corroborated the defendant as to the beginning of the difficulty; second, it corroborated the testimony of Dr. W. W. Weathersby in that it helped to identify the person who was talking to and who made the threats against the life of the defendant, as being the deceased Bradley, and it linked in and corroborated the testimony of Mrs. Leverett as to the telephone conversation in which deceased Bradley again threatened defendant's life.

We respectfully submit that the action of the court in ruling out this testimony alone is sufficient to entitle the defendant to a new trial.

In passing on the instructions we submit to the court without further argument that instructions for the state numbered 1, 2, 3, and 4, are erroneous for the reasons stated in the assignment of error and motion for a new trial. We do not renew said statements now, because nothing further can be added to the statements already given. We wish to discuss, however, instructions numbered 5 and 9 together. The court will note that instruction number 5 and also instruction number 9 singles out a part of the testimony and an important and material part, and calls the jury's special attention to same, and directs them in instruction number 5 that—"still the finding and reading of this letter is no excuse, justification nor defense for the taking of the life of Ed. Bradley"—and instruction number 9 says—"still such conduct in writing the same on the part of Leverett's wife, does not in law, justify or excuse, nor makes a legal and lawful defense for the taking of Ed. Bradley's life by Leverett, the defendant, and you should not so consider the same if you believe from the testimony beyond a reasonable doubt Leverett killed Ed. Bradley."

We think the writing of the letter above referred to, was a very important item to be considered by the jury in determining who was the aggressor in the difficulty. On this theory and on this theory only, the letter was allowed by the court to be introduced in testimony and it ought to have been received by them, as any other part of the testimony without being singled out, separated and set apart in instructions by the state, and specifically condemned by said instructions. We contend that a man ought to be tried by the law as a rule, and that the testimony ought not to be pointed out by the court in a way to effect its weight as testimony.

We submit that instructions number 6 and 7, ought to have been refused by the court because instruction number 6 announces that—"the only excuse or justification offered by the defendant for the killing of Ed. Bradley is self-defense."—This is a peremptory instruction, withdrawing from the jury's consideration the defense of . . . failure to believe the testimony offered on any material point. Instruction number 7 goes still further than instruction number 6 and announces to the jury that . . . "the defendant offers self-defense for the killing of Ed. Bradley and under the law in this case, you should not consider any defense other than that offered and supported by the testimony in this case."

The court will note that instruction number 6 used the statement that the only excuse or justification offered by the defendant, etc., and instruction number 7 after announcing the same proposition is peremptory that the jury were not to consider any defense other than that . . . "offered and supported by the testimony in this case." The reading of these two instructions together will convince the court that the effect of these two instructions were to remove the burden, from the state, of showing defendants guilt beyond every reasonable doubt and placing the burden upon the defendant to offer some satisfactory defense, and see that same is supported by the testimony whereas we understand the rule to

be that the state must show the defendant to be guilty beyond all reasonable doubt, and this is true even though the defendant offered no testimony or no defense.

We respectfully submit that the court was in error in granting the instructions above referred to for the state, and because of this appellant should be awarded a new trial.

We wish to call the court's attention particularly to instruction number 1, the court having allowed the defendant in his testimony to state to the jury the threats delivered by deceased to him while at Columbia. We undertook before the court in this instruction to say to the jury for what purpose this testimony might be received by them. After the court had granted to the state instructions numbered 5 and 9 saying to the jury that the finding and reading of the letter was no excuse or justification for the killing, and was not to be considered by the jury in that connection, it then became of greater importance to the defendant to have the jury properly instructed, as to how this testimony might be received by the jury, so in instruction number 1, we requested the court to instruct the jury that the threats used in connection with this particular transaction and allowed by the court in the evidence were to be taken into consideration in determining which was the aggressor in the difficulty. We have heretofore cited the court on the question of the admissability of the testimony of Dr. W. W. Weathersby, Mrs. T. H. Leverett and ——— Wilkerson, the cases decided by this court on the question of the admissability of threats communicated and uncommunicated, each of these cases also pronounce the rule that the purpose of such testimony is to aid the jury by the consideration of the threats in determining who was the aggressor in the difficulty.

We also direct the court's attention to instruction number 2; nowhere in the case, from the defendant's point of view, has the jury been told the meaning of the law term, "overt act." The state by its instruction told the jury that if the appellant killed deceased at a time when he was in

no danger real or apparent, etc. . . . then he was guilty of murder. From appellant's point of view it then became highly important for the jury to be instructed as to what the law was with reference to the meaning of an overt act. An overt act as we understand it, may be a motion or a gesture, which under ordinary circumstances would be considered trivial, but if weighed in the light of the surroundings and taking into consideration the attitude of appellant and deceased at the time of the shooting, then such motion or action could be considered as an overt act. For this reason we say, the court ought to have granted instruction number 2 explaining this matter to the jury.

Ross A. Collins, Attorney-General, for the state.

The trial judge must exercise some discretion in excluding from the jury prior threats and details of controversies which under the facts of the case have no relevancy.

In the case of *Holly v. State*, 55 Miss. 425, CHALMERS, J., in opinion of the court on page 431 said that while the prisoners should be given the benefit of every reasonable doubt, it was nevertheless the duty of the court to decide whether there has been any evidence upon this particular point so as to warrant the admission of such prior threats; "but the delicacy of the duty will neither prevent nor excuse him from discharging it." See, also, *Harris v. State*, 47 Miss. 318; *Evans v. State*, 44 Miss. 762; *Edwards v. State*, 47 Miss. 581; *Newcome v. State*, 37 Miss. 383; *Holly v. State*, 55 Miss. 424; *Kendrick v. State*, 55 Miss. 436; *Harrison v. State*, 66 Miss. 532. Appellant next complains of the giving of the state's several instructions. Instruction number 5 reads as follows:

"The court instructs the jury for the state that even though you believe from the evidence that Leverett found in and removed from the pocket of Bradley a letter and then read the same and that the same is the letter introduced in this case, still the finding and reading of this letter is no excuse, justification nor defense for the tak-

ing of the life of Ed. Bradley. If you believe from the testimony beyond a reasonable doubt that Leverett took the life of Bradley, and you should not under your oaths as jurors consider the letter as an excuse, justification or defense.”

You will note that appellant in his argument quotes only a part of this instruction and that the instruction constituted as a whole, correctly states the law. The writing of this letter forms no basis of defense for the appellant and its relevancy as a part of the evidence was ended when the appellant showed that he found this letter and that the deceased, upon finding that it had been discovered by him, threatened to kill him. However, instead of carrying out his threats the record shows that the deceased immediately left town and apparently tried to avoid being thrown with the appellant.

Instruction number six merely confined the jury's attention to the issues in the case, telling them that the appellant's only plea, which they may consider, is that of self-defense.

He next complains of instruction number 7 for practically the same reason, contending that its effect was to instruct the jury peremptorily against the appellant.

The appellant argues at length against the propriety of giving the several state's instructions but an examination of these instructions show that they are proper and are based on facts applicable to the state's theory, and for which ample warrant is found in the record.

The appellant strongly contends that instruction no. 8 was improper in that it deprived him of his plea of self-defense. The jury is told by this instruction that if the appellant shot the deceased when he had his back toward him and in no real or apparent danger, then there is no excuse or justification, but it also tells them that they must believe that the shots were fired wilfully, feloniously and of his malice aforethought to kill and murder the deceased. I submit that if it were not for the concluding part of this sentence appellant's contention would have

some weight but that on the whole the instruction is clear and contains the law applicable to the facts.

Reviewing the record as a whole and studying carefully the many alleged errors, I submit that the trial court was correct in its rulings and that the verdict was amply warranted by the facts of the case.

I therefore respectfully submit that the case should be affirmed.

POTTER, J, delivered the opinion of the court.

The appellant in this case was indicted by the grand jury of Perry county on a charge of murdering one Ed. Bradley. He was tried once in Perry county, which resulted in a mistrial. A motion for a change of venue was made, and the venue changed to Forrest county. The first time the case was tried in Forrest county, there was a hung jury, and a mistrial entered, and upon a third trial of the case, being the second trial in Forrest county, the defendant was convicted and sentenced to the penitentiary for life.

The appellant admitted at the trial that he had killed Bradley, but claimed that he acted in self-defense.

This case must be reversed. The errors committed in the court below begin with the court's examination of the jurors on *voir dire*. We quote partially from the examination of one of the jurors by the court on his *voir dire* examination, which questions counsel agree are the same as those propounded to all the jurors by the court in qualifying the jury:

"By the Court: Q. Do you believe in law enforcement?

"Juror: A. Yes. Q. Are you in sympathy with law breaking of any kind—do you believe in enforcing all the criminal laws of the state? A. Yes. Q. You realize that this is what protects you? A. Yes. Q. Are you in favor of helping to enforce all laws as a citizens? A. Yes. Q. Do you feel like it is your duty as a citizen to enforce the laws? A. Yes. Q. Do you understand, when you are taken on the jury, it is your duty to convict people because you are in sympathy with law enforcement do you? A. No. Q. Now,

in this case Mr. Leverett is charged with murdering Ed. Bradley over here at Richton, Miss. If you are taken as a juror to try Leverett, will you go into the jury box and sit there and listen carefully to the testimony that the witnesses give you from the stand, and consider that carefully, and then take the written instructions that the court gives you; that is, the law in the case. The court will give you certain written instructions that will be applicable to the case, and all the law there is in the case. There will not be any law applicable to the case except the written instructions that I give you. Will you accept that as the law of the case? A. Yes. Q. Now if you are taken as a juror to try this case, will you try it on sentiment? Are you one of these fellows that pay attention to every insinuation or suspicion, or have they got to show you the facts before you will act? A. The facts. Q. Suppose that after you have heard all the evidence in the case you are not satisfied that the defendant is guilty—you have a reasonable doubt of that—will you give the defendant the benefit of the doubt? A. Yes. Q. But if you are satisfied that he is guilty of murder beyond a reasonable doubt, have you the moral courage to vote him guilty? Have you got the nerve to do your duty? A. Yes, sir. Q. Would you do it? A. Yes, sir. Q. If the evidence in this case satisfied your mind beyond a reasonable doubt and to a moral certainty that T. H. Leverett murdered Ed. Bradley, as charged in the indictment, would you find him guilty? A. Yes, sir. Q. You would do that now, would you? A. Yes. Q. You feel like you have the moral courage to do it, do you? A. Yes. Q. If you go on the jury and sit there to try the case, after you have heard all the evidence in the case, in the state's lawyers, Mr. Hall, Mr. Talley, or Mr. Cassedy, or Mr. Currie, or Mr. Davis would get up there and try to inject something in there, insinuation, would you pay any attention to that? A. No. Q. You would go by the law and the evidence; you would say: 'Gentlemen, you have not shown me that; that is not in the record.' Would you do that? A. Yes. Q. You are going to try the

case by the law that the court gives you, and by the evidence that you hear from the stand? A. Yes. Q. From these two things you promised me upon your sacred word of honor and your oath that you will try it? A. Yes."

There was objection to the questions propounded by the court, upon the ground that the court indicated to the proposed jurors what finding they ought to make on the evidence afterwards to be introduced by the defendant in the trial of the case. The defendant in this case claimed that the controversy between himself and the deceased arose on account of the discovery of illicit relations between the wife of the defendant and the deceased, Bradley. On the defendant's theory of the case, the testimony with reference to the improper relations above mentioned was admissible because the decedent had made certain threats, growing out of this controversy, against the defendant, and because the circumstances of the parties were explanatory of the condition of the mind of deceased at the time of the homicide, and tended to show what the deceased probably would have done, under the circumstances, and it is insisted that such facts and circumstances are corroborative of defendant's statement that he shot the decedent in self-defense, and that when the court referred in his examination of the jurors to "sentiment being injected into the record," the question went directly to the weight the jurors should give to the evidence to be introduced. The court, undoubtedly, anticipated that evidence would be introduced showing the illicit relations between the decedent and appellant's wife, and was attempting to forestall any attempt on the part of appellant to plead the so-called "unwritten law." The evidence, however, offered by the appellant, with reference to the illicit relations between his wife and the decedent, and the controversy and threats growing out of same, was a material part of his case, and served a legitimate purpose as corroborative of the appellant's version of the affair in so far only, of course, as it shed light on who was the aggressor. Evidently the judge, in question-

ing the jurors about whether or not they would be controlled by "sentiment," anticipated this very testimony, and, by his questions, greatly disparaged this evidence. The effect of such questions on the minds of the jurors was as effective as if the judge had said, in so many words:

"The self-defense story in this case is 'trumped-up.' The defendant is trying by this means to plead the 'unwritten law.'"

The whole trend of the *voir dire* examination was to influence the proposed jurors against the defendant, and to strongly impress them with the idea that their duty was to convict. Each juror was given to understand that he would be a man of very little moral courage unless he found a verdict of guilty in this case. Such examination was erroneous, and very prejudicial to the defendant.

The testimony of Dr. W. W. Weathersby was to the effect that he met Bradley, the deceased, at Brookhaven, and that Bradley told him he was on a hunt for a woman, and asked him if he knew the Dunns (Mrs. Leverett having been a Dunn before her marriage), and was told that he did; and Weathersby testified that Bradley told him that the woman he was hunting for was a married woman, and remarked that there would be trouble if her husband, who was at Columbia, found out about their relations, and that he would either have to kill the husband or the husband would kill him. This evidence was admissible, and the court erred in excluding it. Though uncommunicated, the conversation related to the feeling Bradley had for Leverett, and was threatening.

Likewise, the testimony of Mrs. Leverett, with reference to a conversation with Bradley over the telephone, which conversation was communicated to Leverett, was admissible for the same reason. *Harris v. State*, 72 Miss. 99, 16 So. 360; *Holly v. State*, 55 Miss. 424.

The testimony of S. W. Wilkerson, who carried Bradley from Columbia to McComb City on the day he is said to have gone to Brookhaven, should not have been excluded, because it was corroborative of the testimony of Mrs.

Leverett and Dr. Weathersby, to the extent of showing Bradley was in Brookhaven at the time indicated by their testimony. The testimony of Mrs. Leverett and Dr. Weathersby was vital to defendant's case, as corroborative of his own evidence that he acted in self-defense.

There was also error in excluding the testimony of Mrs. Leverett that she had written the letter found by Leverett in Bradley's pocket at Columbia. The introduction of this evidence had a tendency to prove the corroborative circumstances of the defense genuine.

It was error to permit the introduction of evidence that a man in a Palm Beach suit of clothes, such as defendant wore at the time, was seen, the night before the killing, looking up into the mill where Bradley was working, without further identification. The fact that a person had on Palm Beach clothes or white clothes in the summer time, when many people wear such clothes, is insufficient to show that a person who had on such clothes was a particular person.

The appellant assigns as error the giving of instructions 5 and 9 for the state, upon the ground that these instructions single out a part of the testimony as important and material, and calls the jury's special attention thereto; and it is urged that these two instructions are on the weight of the evidence, and should not have been given. The instructions are as follows:

"(5) The court instructs the jury for the state that, even though you believe from the evidence that Leverett found in and removed from the pocket of Bradley a letter and then read the same, and that the same is the letter introduced in this case, still the finding and reading of this letter is no excuse, justification, nor defense for the taking of the life of Ed. Bradley, if you believe from the testimony beyond a reasonable doubt that Leverett took the life of Bradley, and you should not, under your oaths as jurors, consider the letter as an excuse, justification, or defense."

“(9) The court further instructs the jury for the state that, even though you believe from the evidence Leverett’s wife wrote the letter introduced in this cause, and which Leverett claims he got out of Bradley’s pocket at Columbia, still such conduct in writing the same on the part of Leverett’s wife does not, in law, justify, excuse, nor make a legal and lawful defense for the taking of Ed. Bradley’s life by Leverett, the defendant, and you should not so consider the same, if you believe from the testimony beyond a reasonable doubt Leverett killed Ed. Bradley.”

We think the above instructions bear directly on the weight the jury should give the evidence with reference to the letter found in Bradley’s pocket, and the jury were, in effect, told not to consider this evidence, although, as a matter of fact the evidence under consideration was important and material evidence as corroborative of the defendant’s claim of self-defense.

The giving of instruction No. 8 for the state is assigned by the appellant as error. This instruction reads as follows:

“The court further instructs the jury for the state that if you believe from the testimony beyond a reasonable doubt that the fatal shot fired by the defendant was fired after the deceased, Bradley, had wheeled or turned his back to the defendant, and while the defendant was in no real or apparent danger at the hands of Bradley, then under the law there is no excuse for, or justification of, the defendant for the same, if you believe from the testimony beyond a reasonable doubt that he fired it willfully, feloniously, and of his malice aforethought to kill and murder Ed. Bradley.”

This instruction, in effect, instructs the jury to find the defendant guilty even though he fired the first shot in self-defense, if the deceased was killed by the subsequent shots after he had turned his back. The testimony for appellant showed that the shots were fired in rapid succession, and that, on account of the smoke and excitement, the defendant did not know the position of the deceased when he shot

the last three shots. This instruction entirely ignored the defendant's version of the shooting, and what occurred at the time, and his testimony that the shots were fired in rapid succession, and that in the excitement and smoke he did not know what position the deceased was in at the time he fired the shots subsequent to the first. The giving of this instruction was manifest error.

Instructions 6 and 7 are as follows:

"(6) The court further instructs the jury for the state that the only excuse or justification offered by the defendant for the killing of Ed. Bradley is self-defense.

"(7) The court further instructs the jury for the state that the defendant offers self-defense for the killing of Ed. Bradley, and under the law in this case you should not consider any defense other than that offered and supported by the testimony in this case."

While possibly not erroneous, by emphasizing the uncontroverted fact that appellant's defense in this case was self-defense, the above instructions reflected by *innuendo* on defendant's testimony with reference to the trouble out of which this controversy grew. Why stress, with two instructions, the fact that the defense in this case is self-defense, when no other defense is suggested, except upon the presumption that the jury might otherwise give more credence to the testimony with reference to the original cause of the trouble than the trial judge thought it should give to such testimony? In addition, these instructions seem, in a measure, to shift the burden of proof from the state to the defendant.

Instruction No. 1, requested by the appellant, and refused, is as follows:

"The court instructs the jury for the defendant that, if you believe from the evidence that on a day prior to the killing defendant found a letter from his wife to the deceased, Bradley, and that the defendant and deceased, Bradley, got into a difficulty on account of same, if you believe when defendant and deceased, Bradley, separated Bradley said to the defendant: 'You be God damned sure

you are ready the next time we meet; I'll never give you this chance again'—or words to that effect, then you may take this into consideration in determining who was the aggressor in the difficulty at Richton."

This instruction is correct, and should not have been refused. It was perfectly competent for the jury to take into consideration, in determining who was the aggressor in the difficulty at Richton, the threats previously made by Bradley to the defendant.

Instruction No. 3, asked for by the defendant, and refused, is as follows:

"The court instructs the jury for the defendant that the law is that a man assaulted, or about to be assaulted, with a deadly weapon is not required by the law to wait until his adversary is on equal terms with him, but may rightfully anticipate his action and kill him, when to strike in anticipation reasonably appeared to be necessary to self-defense; and, unless the jury are satisfied to a moral certainty and beyond every reasonable doubt that the deceased, at the time of the killing, was not attempting to draw or use a pistol, then they must find the defendant not guilty."

We think this instruction is applicable to the case, plainly states the law, and should have been given; no other instruction of like purport having been given.

For the errors above set out, this case is reversed and remanded.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. SHOWERS.

[73 South. 276 Division B.]

1. **COMMERCE.** *Exclusive power of congress. Interstate Commerce Commission authority. Evidence. Presumption. Compliance with law. Telegraphs. Action for failure to deliver. Damages for mental suffering. Punitive damages. Federal law.*

By Act of Congress, June 8, 1910, chapter 309, 36 Stat. 539, amending Interstate Commerce Act, Feb. 4, 1887, chapter 104, 24 Stat. 379, making telegraph companies common carriers within the meaning and subject to the provisions of the interstate commerce act, congress has taken possession of the field of interstate commerce by telegraph, and it results that the power of the state to legislate with reference thereto has been suspended.

2. **INTERSTATE COMMERCE.** *Commission. Authority.*

As to whether a stipulation on a telegraph blank limiting the telegraph company's liability to fifty dollars, in the absence of greater expressed valuation of the message, is reasonable or unreasonable, valid or void, is a matter to be determined by the Interstate Commerce Commission and not by the state courts and even if such stipulation ought to be unenforceable, nevertheless the state courts cannot so decide it.

3. **EVIDENCE.** *Presumption. Compliance with law.*

Where there is no evidence to the contrary, the presumption is that an interstate carrier has complied with the federal laws.

4. **INTERSTATE COMMERCE.** *Telegraphs. Action for failure to deliver. Damages for mental suffering.*

Since Congress has assumed control of interstate telegraph business by Act Cong. June 18th., 1910, amending interstate commerce Act Feb. 4th, 1887, making telegraph companies common carriers within the act, the federal rule denying recovery for damages for mental suffering, alone governs in suits for damages from delay in delivering an interstate telegram.

5. **TELEGRAPH.** *Telephones. Punitive damages. Federal law.*

Under the Federal Rule the master is not liable for punitive damages unless he participates in the wanton or malicious act of his servant or agent or subsequently ratifies it and this rule applies in a suit for damages from delay in delivering an interstate telegram.

APPEAL from the circuit court of Coahoma county.

HON. W. A. ALCORN, Jr., Judge.

Suit by H. H. Showers against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

J. B. Harris, for appellant.

Prior to the passage of the Act of Congress of June 18, 1910, Congress had not legislated or acted in any way in reference to interstate telegraphic communications although it had long been held that the interstate telegraphic business was interstate commerce.

In the case of the *Western Union Telegraph Co. v. Texas*, 105 U. S. 460, the supreme court of the United States said: "The telegraph company occupies the same relation to commerce as a carrier of messages that the railroad company does as the carrier of goods. Both companies are instruments of commerce, and their business is commerce itself."

The court is familiar with the numerous cases on this point. See: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Pembleton*, 122 U. S. 347; *Leloup v. Port of Mobile*, 127 U. S. 406; *Western Union Tel. Co. v. Commercial Milling Co.*, 118 U. S. 406; *Western Union Tel. Co. v. Crovo*, 220 U. S. 304; *Western Union Tel. Co. v. Brown*, 234 U. S. 542.

In the case of *Jones v. Express Co.*, 61 So. at page 165, the question before this court was the validity of a stipulation in an express receipt limiting the liability of the company to fifty dollars. The court cited the case of *Express Co. v. Croniger*, *supra* and the case of *Railroad Co. v. Miller*—U. S. 513, 27 Law Ed. page 323, holding that on interstate shipments the Act of Congress was exclusive of all state statutes or policies, and the decisions of that court were the supreme law in reference to contracts of similar import. See, also the cases of,

Express Co. v. Burke & McGuire, 61 So. 312; *Railroad Co. v. Woodruff*, 62 So. 171.

In addition to the Federal cases above cited on the question as to the effect of the action by Congress, we cited the following cases: *Northern Pac. R. R. v. Washington*, 222 U. S. 307; *So. Ry. Co. v. Reid*, 22 U. S. 424; *Mondou v. R. R. Co.*, 223 U. S. 1; in which the court held that the Federal Employers' Liability superseded all state regulations and all common-law rules laid down by the states on that subject. *Chicago R. R. Co. v. Elevator Co.*, 226 U. S. 426; *New York Central R. R. Co. v. Hudson Co.*, 227 U. S. 249; *St. Louis R. R. Co. v. Edwards*, 227 U. S. 265; *Boston & Maine R. R. Co. v. New York*, 233 U. S. 671.

These cases touch upon various subjects upon which Congress has acted and all hold that action by Congress preempts and occupies the entire field to the exclusion of all state regulations, statutes, policies, and common-law rules.

In the case of *Western Union Tel. Co. v. Bilisoly*, 116 Va. 562, it was held that by the Act of Congress, approved June 18, 1910, telegraph companies so far as interstate business is concerned have been placed under the direct supervision of the Interstate Commerce Commission and are subject so far as applicable to the same rules, regulations, restrictions and penalties as imposed upon common carriers. This act has occupied the entire field and taken complete control of the regulation of telegraph companies, and while it has impliedly exempted them from any penalty for negligence, it has provided a severe maximum penalty for intentional discrimination. Before the passage of this Act there had been no legislation by Congress affecting or conflicting with the state statute imposing a penalty for failure to deliver messages promptly, and therefore state statutes affecting telegraph companies were upheld even as to interstate messages upon the ground that until Congress had legislated upon the subject of telegraph companies the state stat-

utes were applicable, citing the *James Case*, 126 U. S. 650; *Commercial Milling Co. Case*, 218 U. S. 406; *Crovo Case*, 220 U. S. 364, and others.

Further the court held, that even if the plaintiff's case was based on an unreasonable regulation, it is a question which cannot be determined primarily in the court. The question must be first raised before the Interstate Commerce Commission, citing *Railroad Co. v. Abilene Cotton Co.*, 204 U. S. 426; 51 Law Ed., 553; *Baltimore R. R. Co. v. U. S.*, 215 U. S. 481; 54 Law Ed., 292.

In the case of *Gardner v. Western Union Tel Co.*, decided by the United States circuit court of appeals for the eighth circuit, reported in *Advanced Sheets*, 231 Fed., the court held that by virtue of the amendment of June 18, 1910, Congress had not only taken possession of the field of interstate commerce by telegram, but had also specifically prescribed rules which shall govern the transactions of such commerce. This case is an instructive one, and cites the *Bilisoly case*, above referred to, and numerous state cases bearing on the subject. See, *Western Union Tel. Co. v. National Bank of Berryville*, 83 S. E. 224.

This case followed the *Bilisoly Case*, *supra*. The case of *Dodge v. Express Co.*, 54 Pa. Super. Ct., 222; *Ridge v. Erie R. R. Co.*, 54 Pa. Super. Ct., 602, are both cases upholding the valuation clause in receipts and bills of lading. See, also, *Strauss Gas and Oil Co. v. Tel. Co.*, 59 Pa. Super. Ct., 124.

In *Western Union Tel. Co. v. Compton*, 169 S. W. (Ark.), 946, the court upheld the valued message clause in the telegraph blank. *Western Union Tel. Co. v. Johnson*, 171 S. W. (Ark.) 859, and *Western Union Tel. Co. v. Simpson*, 174 S. W. (Ark.), 232, the court held that mental anguish could not be recovered on an interstate message.

It is the established rule in the Federal courts that the stipulation as to value is not a stipulation relieving the company from liability for negligence. In the case of

Hart v. Pa. R. R. Co., 112 U. S. 276, 28 Law Ed., page 717, the court says: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

This case was referred to with approval in the case of *Express Co. v. Croninger*, *supra*. See, also, the case of *Boston & Maine Railroad Co. v. Hooker*, 233 U. S. 671, 58 Law Ed. 875; *R. R. Co. v. Harriman Bros.*, 227 U. S. 672, 57 Law Ed. 690; *Chicago R. R. Co. v. Miller*, 227 U. S. 57, Law Ed. 323.

The authorities above cited established beyond question, we submit the following propositions: First, that the stipulation as to the repeated and unrepeatd messages has been expressly and specifically declared to be reasonable and authorized by express Act of Congress, and it is, therefore, not an open question for discussion by this court or any other.

Second, that the regulation or stipulation in regard to the valuation of the message is a reasonable regulation, and is binding and enforceable, although the act occasioning the loss is a negligent one, and here we desire to call the court's attention to the fact that it is immaterial

whether the act is characterized as gross negligence, or simply negligence, because no distinction exists, and there are no degree of negligence in the Federal courts. See, *Railroad Co. v. Arms*, 91 U. S. 489, 23 Law Ed. 374, *The New World v. King*, 16 How. 469, 14 Law Ed. 1019; *Kelly v. Marlot*, 135 Fed. 74; *Purple v. Union Pac., R. Co.*, 114 Fed. 123.

Third, in any event, the question of the reasonableness or unreasonableness of the stipulation is a matter for the determination of the Interstate Commerce Commission and cannot be raised in the first instance in the state of Federal courts.

See, *Telegraph Co. v. Bank of Spencer*, *supra*; *Telegraph Co. v. Williams*, *supra*; *Haskell Implement & Seed Co. v. Tel. Co.* *supra* (conclusion of opinion).

We have brought into view the authorities above cited, because they bear directly upon the question as to the correctness of the court's ruling in overruling the demurrer to the special pleas.

Cutrer & Johnston, for appellee.

It is true that Congress has undertaken to assume control of the regulations of contracts between telegraph companies and the public under the terms of the Carmack Amendment, as stated in the act of June 18, 1910, but it is also true that the defendant has not filed its rates and tariffs, rules and regulations, with the Interstate Commerce Commission. It is also true that the rules and regulations of the defendant are not binding upon the public, and certainly not upon the plaintiff unless they are filed with the Interstate Commerce Commission, as required by law.

It is also true that no regulations of the defendant limiting liability are binding, unless they are made binding under the provisions of the Carmack Amendment to the Interstate Commerce Act, which law alone undertakes to set out a measure of liability to cover con-

tracts between the telegraph companies and the public.

The mere fact that Congress has authorized the Interstate Commerce Commission to consider the classifications of telegrams into day and night, repeated and unrepeatd, letter and commercial telegrams, does not operate of its own force, to put such rules and regulations into effect.

It is contended by the defendant that the telegraph company was not required to file its schedules of charges, etc., with the Interstate Commerce Commission, and counsel argues the case for the defendant on that theory, but that particular matter has been authoritatively settled by a construction of the act, as applied to telegraph companies, in the case of *Gardner v. Western Union Telegraph Company*, United States circuit court of appeals, eighth circuit, decided February 28, 1916, in 231 Federal Reporter, page 405.

Upon that point, the court announced the rule to be as follows: "Pertinent to this contention, sections 1, 2, 6, 12, and 15, of the act to regulate commerce as amended, are cited. We cannot repeat these sections here, but it appears beyond question therefrom that, in so far as the provisions of the act to regulate commerce are applicable it applies to all interstate telegraph business; that as to all interstate business telegraph, telephone, and cable companies are common carriers within the meaning and purpose of the act; that as to their interstate business telegraph companies must print and publish their rates, rules, classifications, regulations and practices, and file same with the Interstate Commerce Commission; that they shall establish reasonable rates, rules, regulations, and practices, but messages may be classified into day, night, repeated, unrepeatd, and such other classes as are just and reasonable, and different rates may be charged therefor; that all rates, regulations, and practices must be reasonable and just; that penalties are imposed for any attempt to evade the published rates, rules, practices, or regulations."

In this case, the alleged contract was said to be operative because the proof showed the schedules had been filed with the Interstate Commerce Commission as required by law, and the proof affirmatively shows in this case, that had not been done.

It has been held by a long list of authorities, beginning with the case of *Adams Express Company v. Croninger*, 226 U. S. 491, 57 L. E. 314, that by the Carmack Amendment, the Congress assumed control of Interstate Commerce carried on by transportation companies, as well as by telephone, telegraph and cable companies, and that it was lawful for such companies to make contracts in writing limiting their liability, where the limitation was based upon a consideration, but that the contract had to be evidenced by some writing issued by the interstate agency. The theory upon which the court proceeded in all these cases, was and is that if the shipper had affirmatively fixed a valuation upon the property to be transported, and if the rate was based upon the value, the shipper was estopped to make or assert a claim for greater value in the event of loss or destruction of the article which might be the subject-matter of the contract.

It was further decided in all these cases, that the rule did not apply unless the schedules had been filed with the Interstate Commerce Commission as required by law.

The supreme court of the United States has never gone further than to say that if the schedules, rules and regulations are on file as required by the Act of Congress, knowledge of the contents thereof will be imputed to the parties delivering the commodities or sending the message, and that in any event, some writing must be given by the carrier or telegraph company to the sender to evidence the contract. On these several matters, we refer to the following cases: *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. E. 314; *Chicago, St. P. M. & O. Ry. Co. v. Latta*, 226 U. S. 519, 57 L. E. 328; *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. E. 600; *K. C. S. Ry. Co. v. Carl*, 227 U. S. 639; 57

57 L. E. 600; *K. C. S. Ry. Co. v. Carl*, 227 U. S. 639; 57 L. E. 683; *M. K. & T. Ry. Co. v. Harriman Bros.*, 227 U. S. 657, 57 L. E. 690; *C. B. & Q. Ry. v. Miller*, 226 U. S. 513, 57 L. E. 323; *St. L. I. M. & S. Ry. Co. v. Edwards*, 227 U. S. 265, 57 L. E. 506; *S. T. & S. F. Ry. Co. v. Robinson*, 233 U. S. 173, 58 L. E. 901. The case which has made the announcement last above stated, is that of *Boston & Maine Railroad Co. v. Hooker*, 233 U. S. 97, 58 L. E. 868.

It would seem, therefore, that no sort of an engagement was made by the plaintiff with the defendant to limit the liability of the defendant for its negligence, either express or imputed by law, and, therefore, the defendant stands liable for the consequence of its negligence.

It is said that the court authorized the recovery of punitive damages, and damages for mental suffering, and that this could not be done under the rule announced by the supreme court of the United States regarding recoveries of losses suffered on interstate commerce transactions by rail and telegraph.

There has never been any restriction sought to be imposed by congress upon recoveries in the several states, for damages growing out of torts. The law of the forum in each case, controls these several matters.

The common law as administered in Mississippi, is binding upon the courts of the United States as to all actions brought for injuries suffered in Mississippi. The contract with the defendant as made by the plaintiff was made by it in Mississippi, and the wrong inflicted upon the plaintiff by the defendant, was inflicted upon him in Mississippi, and the right to recovery against the defendant for the wrong is vested in the plaintiff under the law of Mississippi, and the remedy for the breach of the wrong may be resorted to and pursued in Mississippi, according to the due course of the common law as announced by the courts of Mississippi.

It will be observed in this case, that there is no sort of effort to recover for mental pain and anguish, but that the only contention made by the plaintiff in the court below and in this court, is that if the plaintiff is entitled to recover punitive damages, it may be submitted to the jury as to whether or not the annoyance and worry of the plaintiff, will be considered by the jury in fixing the amount of punitive damages. And this is according to the well-established course of the common law in Mississippi, and elsewhere. *Burke v. Reese*, 60 Miss. 906; 6 Thompson, Negligence (2 Ed.), sec. 7321, and cases cited. That the plaintiff in this cause has a well-established right to recover according to the course of the common law, is established by the supreme court of the United States in the case of *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 54 L. E. 1088.

It was never intended by Congress by the passage of the Carmack Amendment, or by any other portion of the Interstate Commerce Act, to restrict the courts of the several states in the administration of the law of their several jurisdictions. The supreme court of the United States has never undertaken to condemn anything except statutes which place a direct burden on commerce, or which undertake to operate beyond the territorial limits of the states which may have adopted the several regulations which have been from time to time called in question. *Gardner v. Western Union Tel. Co.*, 231 Fed. 411.

Regulations imposing penalties for the nonobservance by the agencies of interstate commerce, of their obligations to the public, have been practically uniformly upheld by the supreme court of the United States. There is no requirement that there shall be uniformity of recovery in every state for the breaches of like duty, in each of the several states, but each state has determined, and may determine, these several matters for itself. *M. K. & T. R. R. Co. v. Cade*, 233 U. S. 642, 58 L. E. 1135; *Seaboard Air Line v. Cegers*, 203 U. S. 73, 52 L. E. 108; *Y. & M.*

V. R. R. Co. v. Jackson Vinegar Co., 226 U. S. 217, 57 L. E. 193; *K. C. S. Ry. v. Anderson*, 233 U. S. 325, 58 L. E. 983; *Western Union Tel. Co. v. Crovo*, 220 U. S. 364, 55 L. E. 498; *Western Union Tel. Co. v. James*, 162 U. S. 650, 40 L. E. 1105; *Western Union Tel. Co. v. Commercial Milling Co.* 218 U. S. 406, 54 L. E. 1088; *M. K. & T. Ry. Co. v. Shampenois*, 61 So. 426.

There is, however, no contention in this case that there was any effort to impose any penalty on the defendant for the failure to perform its duty, nor any contention that a penalty was imposed upon the defendant for the nonperformance of its duty towards the plaintiff.

It is a well-established rule of law, that punitive damages may be awarded against corporations, as well as individuals for misconduct of various kinds and degrees. In Mississippi, punitive damages may be awarded for wilful misconduct or gross negligence tantamount to wilfulness, and it is not given to the courts of the United States to say to the courts of Mississippi what conduct will or will not justify a jury in inflicting or awarding punitive damages. The courts of the United States cannot say that an unprovoked assault by the conductor of a passenger train, upon an interstate passenger, who may sue for the wrong in the courts of Mississippi, would not warrant the infliction of punitive damages upon the carrier, because the assault had not been committed by the president or some executive officer of the carrier, nor can the courts of the United States undertake to control or correct the courts of Mississippi, in the construction and application of the common law to causes arising within the jurisdiction of the state, and which are properly cognizable by its courts.

In the case at bar, an admitted wrong was perpetrated upon the plaintiff by the defendant, and for that wrong the plaintiff is clearly entitled to relief and to secure compensation for the injuries inflicted upon him, according to the measure of damages fixed by the courts of the state and we assume that neither the courts of the United

States, nor of any other state, will undertake to regulate the courts of Mississippi may see proper to afford under relief that the circumstances presented by the case at bar.

There is a full decision of these several matters, by the Interstate Commerce Commission, in which has been collated a great many of the authorities bearing upon several questions involved in this case, in the proceeding, No. 933, styled: "In the matter of released rates," 13 Interstate Commerce Reports, 550; which we contend supports throughout the argument which we are now presenting to the court.

We submit further, that unless there is a contract between the interstate carrier (railroad or telegraph), and the sender of freight or messages, the Interstate Commerce Act does not apply to limit or control the correlative rights of the parties, nor the liabilities existant as between them, either for negligent misconduct, or other legitimate cause of action, Unless there is a contract under the Carmack Amendment, the common law prevails and the courts of the United States apply their construction of the common law, as contradistinguished from the construction thereof by the several states, only as to bills of lading or other contracts made between the parties in pursuance of the Carmack Amendment. *Southern Railway v. Prescott*, U. S. Advance Opinions, 1916, page 469, decided April 10, 1916, No. 12; *C. N. O. & T. P. Ry. Co. v. Rankin*, U. S. Advance Opinions, 1916, page 55, decided May 22, 1916, No. 15.

Upon the whole case, therefore, we earnestly contend, that the judgment of the court below should be affirmed.

POTTER. J., delivered the opinion of the court.

This was a suit brought by H. H. Showers, the appellee, as plaintiff in the circuit court of Coahoma county, against the Western Union Telegraph Company, appellant, defendant in the court below. This suit was for the negligent delay of about twenty-four hours in the de-

livery of an interstate message addressed at Clarksdale, Miss., to the plaintiff's daughter at Trenton, Ky. This case was tried throughout under the common law of Mississippi as determined by decisions of this court, but should have been tried under the laws of the United States. By an act of June 18, 1910, telegraph companies have been made common carriers within the meaning and subject to the provisions of the Interstate Commerce Act. As stated by the supreme court of Oklahoma in the case of *Western Union Telegraph Co. v. Bank of Spencer*, 156 Pac. 1175, in speaking of this statute:

"It is apparent that Congress has undertaken to occupy the field of interstate commerce by telegraph and to assume exclusive jurisdiction and authority in the regulation thereof, and has specifically prescribed rules which govern business of this character."

In the case of *Gardner v. Western Union Telegraph Co.*, 231 Fed. 405, 145 C. C. A. 399 (8 C. C. A.), now found in the advance sheet of the Federal Reporter of June 8, 1916, the court of appeals says:

"Congress has taken possession of the field of interstate Commerce by telegraph and it results that the power of the state to legislate with reference thereto has been suspended."

The blank upon which the message under consideration was written contains a stipulation:

"That the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd messages beyond the amount of tolls paid thereon nor in any case beyond the sum of fifty dollars, at which, unless otherwise stated below, this message has been valued by the sender thereof."

It is contended by the telegraph company that the clause limiting the liability of the telegraph company to the cost of the telegram or to fifty dollars was a valid and binding stipulation in the contract between the telegraph company and the sender of the message. On the other hand, it is the contention of the appellee in this

case that such stipulations are unreasonable and void. The telegraph company insist that the contract limiting its liability to a sum certain is analogous to the valuation placed on articles offered for shipment and a value placed thereon by the shipper. In our judgment, there is not much analogy between the two, as the value of an article offered for shipment is easily known by the shipper at the time the shipment is made, but damages likely to accrue out of an error or delay in the transmission of a message by telegraph in the very nature of things cannot be fixed with any degree of certainty beforehand. But as to whether or not this stipulation is reasonable or unreasonable, valid or void is a matter to be determined by the Interstate Commerce Commission, and not by us, and even if such stipulation ought to be unenforceable, nevertheless we cannot so declare it.

It is contended in this suit that the telegraph company had not complied with the laws of the United States and the rules of the Interstate Commerce Commission, and for that reason the stipulation is void. However, there is nothing in the pleadings or proof to show that such is the case, and it has been held in the recent case of *C. N. O. & T. P. R. R. Co. v. Rankin*, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, that, where there is no evidence to the contrary, the presumption is that an interstate carrier has complied with the federal laws. In that case Mr. Justice McREYNOLDS said:

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect to transactions in the ordinary course of business it is entitled to the presumption of right conduct."

In this case we think it immaterial whether the fifty dollar limit on liability is valid or not, because under our construction of the law nothing can be recovered in

this case except actual damages, and not more than fifty dollars actual damages is established by the proof in this case. The court in this case authorized recovery not only for actual damages, but for punitive damages and for mental anguish, if the jury believed that the delay in the transmission of the message was due to wantonness, wilfulness, or gross negligence on the part of the agents of the company in handling the message. The case of *Southern Express Co. v. Byers*, 240 U. S. 612, 36 Sup. Ct. 410, 60 L. Ed. 825, was a suit for mental anguish, and arose out of the shipment of a coffin and grave clothes intended for the burial of plaintiff's wife, and accepted by the express company with knowledge of the fact at Asheville, N. C., for transportation to Hickory Grove, S. C. The shipment was delayed, and the plaintiff recovered a judgment for two hundred and fifty dollars in the state court for mental anguish, and this judgment was affirmed by the supreme court of North Carolina. The bill of lading in the case contained the stipulation limiting the liability to fifty dollars. The court held, notwithstanding the state rule, that damages for mental anguish alone could not be recovered under the Federal law. In other words, this being a subject of interstate commerce, the courts held that rights and liabilities of the parties must be determined by the Federal rule, and not by the statute or the common law of the state. In that case the court said:

"Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon the acts of Congress and bill of lading and the common-law principles accepted and enforced by the Federal courts."

The Federal rule with reference to the recovery for mental anguish would apply in the case of an interstate message by telegraph, since the telegraph companies have been made common carriers by the law of the

United States and placed under the supervision of the Interstate Commerce Commission.

The Mississippi rule as to punitive damages was invoked in this case by the plaintiff, and the Mississippi rule allows damages against the master for the wanton, willful, or gross negligent conduct of a servant. Under the Federal rule the master is not liable for punitive damages unless he participates in the wanton or malicious act of his servant or agent or subsequently ratifies it. *Lake Shore R. R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. Under the law as laid down in the case of *Express Co. v. Byers*, *supra*, the Federal rule as to punitive damages applies; as the court held in that case that the rules in force under the Federal statute are the rules of the common-law "accepted and enforced by the Federal courts."

The case is therefore reversed and remanded.

Reversed and remanded.

CARMICHAEL v. CITY OF GREENVILLE.

[73 South. 278, Division B.]

1. WATERS AND WATER COURSES. *Municipal water supply. Covenant Running with the land. Penalty for violating regulation.*

A contract by a city owning water works to furnish a landowner with water on certain premises, is a covenant running with the land and as long as such owner owned the premises he had a right, while subscribing to reasonable regulations made by the city, to be furnished with water and this right would not be cut off because he was delinquent in the payment of his water rent, though during the time of such delinquency the city had a right to cut off his water supply until the rent in arrears was paid.

2. MUNICIPAL WATER SUPPLY. Penalty for violation of regulation.

The regulation of the city in such case requiring the payment of one dollar in addition to delinquent water rent for failure to pay the water rent promptly was unreasonable and void.

APPEAL from the circuit court of Washington county.

HON. F. E. EVERETT, Judge.

Suit by B. B. Carmichael against the city of Greenville. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

B. B. Carmichael, for appellant.

It will first be necessary to discover whether the contention of appellant, plaintiff below, that the city had no right to impose an additional penalty of one dollar and two dollars over and above the usual water rates, is correct, then whether or not after all these sums were tendered, the appellee had a right to refuse appellant a supply of water. The authorities are against the penalties and against the discrimination.

The adding to a consumer's bill penalties of this character are no part of the original sum agreed to be paid or collected and falls clearly within the condemnation of the doctrine laid down in the case of *Vicksburg Water Co. v. Ford*, 102 Miss. 717, 59 So. 880. In this case of the Water Works Company had a rule of adding to consumers' bills ten per cent if bills were not paid by a certain day of the next month. The court said: "The adding to a consumer's bill as provided by appellee's rule ten per cent if bills are not paid by a certain day of the next month is no part of its bill for water furnished, but is simply a penalty, arbitrarily imposed, either for the purpose of enforcing the prompt payment of the consumer's bill, or to indemnify it for any damage it may suffer by reason of these bills not being promptly paid. In any event, appellee's claim therefore should not have been allowed. It has not been empowered by law to impose and collect from its debtors fines for not paying their bills promptly, and the

Brief for appellant.

[112 Miss.]

only damages the law contemplates a creditor will suffer by reason of the mere withholding of money due him is legal interest thereon. The measure of all such damages is legal interest." *Hughes v. Fisher*, 1 Walker's Miss. 516, citing 1 Blackstone. 227; *Paris Mountain Water Co. v. Mills*, 82 S. E. 417. See *Burke v. City of Water Valley*, 40 So. 820; *American Waterworks Co. v. State ex rel. Walker*, 30 L. R. A. 447, 46 Neb. 194, 64 N. W. 711; *People v. Monroe*, 41 Misc. (N. Y.) 198.

Appellant agrees that a water company may within reasonable limitations, and by giving notice, cut off the supply of consumers who refused to pay their water rents, but they cannot as a further penalty require the payment of an arbitrary sum for the cutting off of the water or for the turning on of the same again. 39. Am. & Enc. (2 Ed.) 420; citing *Barker v. Boston*, 1 Allen's Mall. 361; *Red Star Steamship Company v. Jersey City*, 45 N. J. L. 246; *American Waterworks Co. v. Ex rel. Walker*, 46 Neb. 194, L. R. A. 477.

There is no duty cast upon appellant to have paid the unlawful demands of appellee, or, if lawful, the disputed claim. This is a well-settled principle of law, cited by several Mississippi decisions. See *Burke v. Water Valley*, 87 Miss. 732. This rule is laid down in the case of *Wood v. Auburn*, 29 L. R. A. 376. *Chicago v. Rodgers Water Co.*, 73 N. E. 375.

Where a water company presents an erroneous bill, it is liable in damages if it cuts off its service from the overcharged user upon the latter's refusal to pay. *Louisville Tob. Warehouse Co. v. Louisville (Ky.)*, 172 S. W. 928. This is the rule in Mississippi. *Cumberland Tel. Co. v. Hobart*, 42 So. 349; *Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. 33; *State v. Nebraska Telegraph Co.*, 52 Am. Rep. 401; *Mc Ente v. Kingston Water Co.*, 165 N. Y. 27, reversing 19 N. Y. App. Div. 632, 30 Am. & Ency. 420; *Telegraph Co. v. Hobart*, 89 Miss. 252, 42 So. 349. "Rules are not binding unless made so by contract." 74 S. E. 943.

Rules of the character sought to be enforced herein are not uniform, discriminatory and void. Some consumers would be cut out and compelled to pay much more than others who the collector might see fit to favor, and who might come in and pay after others had been cut out, and, to whom the person doing the cutting out might not have reached.

"Parties, by contract, are allowed to fix their own measure of damages in certain cases so far as they are reasonable, yet the amount of damages claimed must be porportionate to the breech alleged." 13 Cyc. 96. *Burke v. City of Water Valley*, 40 So. 829; *Ginnings v. Meridian Waterworks Co.*, 56 So. 450; *Van Norman v. Meridian Waterworks*, 102 Miss. 742.

Boddie & Farish, for appellee.

The peremptory instruction was properly granted on the issue joined on the special plea of appellee, the evidence showing conclusively that the appellee owed the appellant no duty to furnish him water, except by reason of contract made with him under the provision in the conveyances from Archer, McMahon and Wortham. His property was situated outside the city of Greenville and appellee was only required to furnish water from its water plant to the inhabitants of the city of Greenville, except in cases where it contracted to furnish water to others. By accepting the deeds from said Archer, McMahon and Wortham the appellee agreed to furnish water to the property-owners along said roadway so long as they complied with reasonable restrictions and regulations imposed, and one of the regulations was that the water should be paid for in advance and if not paid within thirty days after due, that it should be cut off and not again turned on until all sums due had been paid; and in addition thereto, the sum of one dollar for turning said water off and on. This rule and regulation appellant declined and refused

to comply with and thereby breached and terminated the contract to furnish him a supply of water.

The appellant contends that this rule and regulation is unreasonable and void. He cites the case of *Burke v. Water Valley* in 87 Miss. 732 and *Vicksburg Water Co. v. Ford*, 102 Miss. 717, in support of his contention that said regulation requiring payment of one dollar for turning off and on water is unreasonable and void. This question has never been decided by the supreme court of Mississippi. In the *Water Valley* case the court simply decided that it was unreasonable for a municipality operating waterworks plant to withhold water from a tenant who tenders payment therefor, because a previous occupant of the leased premises had not paid for water furnished him therein. And in the *Ford* case decided that it was unreasonable to charge consumers an additional ten per cent if bills were not paid by a certain day of the month. While there are some decisions to the contrary as shown by appellant's brief, the weight of authority is that such a regulation is reasonable and may be enforced. *City of Mansfield v. Humphreys Mfg. Co.*, 31 L. R. A. (N. S.), 301; 19 Ann. Cas. 842; *Sei v. Water Supply Co., etc.*, 140 Pac. 1067. We respectfully refer the court to these cases and the cases cited in the opinions.

The regulation requiring the payment of one dollar additional being reasonable and enforceable, and the appellant declining to comply therewith, terminated his contract with the appellee for the supply of water, and when he afterwards tendered or agreed to pay the amount claimed, his contract was not in force and the appellee had the right to refuse to accept any amount and refuse further to supply appellant with water. *Hieronymus, et al., v. Bienville Water Supply Co.*, 31 So. 31.

We submit that when appellant refused to comply with the reasonable regulations of the water plant of appellee and thereby breached and terminated his con-

tract with appellee, that appellee owed him no further duty to supply him with water, as, under its charter, it owed this duty only to the inhabitants of the city, and it was only to furnish water to appellant by reason of the provision in the conveyances from Archer, McMahon and Wortham and by reason of the contract made with appellant under said provision. The contract was terminated and had no further effect, and the appellee had a right to refuse to make any other contract with the appellant. The peremptory instruction was, therefore, properly granted and the judgment of the circuit court should be affirmed.

POTTER, J., delivered the opinion of the court.

The plaintiff in this case, B. B. Carmichael, brought suit against the city of Greenville, and charged in his declaration that on and before the 22d day of March, 1909, the defendant municipality owned and operated a public waterworks system for hire and reward, and that in the year 1909 the said defendant purchased and equipped a public park situated about one-half mile south of the corporate limits of the city of Greenville, and that B. B. Carmichael, John K. Archer, R. B. McMahon, and Mrs. Sallie Wortham owned a large tract of land situated between the corporate limits of said city and said public park and known as Greenway Park, and that on the 22d and 23d days of March, 1909, the said Carmichael, Archer, McMahon, and Wortham conveyed to the defendant valuable property rights, and in consideration thereof the defendant agreed to lay a water main along the street leading from said city to said park and to furnish persons who should buy lots in Greenway addition water under such reasonable regulation as the defendant might impose. The plaintiff averred that thereafter the defendant accepted the said conveyances, and in consideration thereof laid its water mains under said street and permitted the plaintiff and others who purchased lots and erected residences on lots

purchased in Greenway addition to connect their premises with said mains and to receive therefrom a supply of water. Plaintiff alleged that, after he had purchased a lot in said Greenway addition and erected a residence thereon and connected his residence with said water main, he received a supply of water therefrom, paying to said defendant the sum of sixteen dollars per annum, payable at the rate of four dollars per quarter. And he alleged that he paid his water rent to defendant for a period of about three years promptly, but through oversight forgot to pay the rent for the quarter beginning July 1, 1914, and ending September 30, 1914, in advance, and that on the 11th day of August, 1914, his water was cut off by defendant. And he alleged that thereafter, upon tender to defendant of four dollars for said quarter, and interest thereon, the defendant demanded the sum of one dollar as a penalty for having failed to pay the water rent promptly, and this regulation the plaintiff avers was an unreasonable regulation. In a second count plaintiff alleges that he tendered the defendant company, after it had cut off his water, the full amount of water rent, and in addition thereto two dollars which, according to the plaintiff "was unjustly, arbitrarily, and maliciously" demanded of plaintiff by said defendant, but that, notwithstanding this offer, defendant had notified the plaintiff that it would not accept any sum of money from him whatever and would not furnish him a supply of water under any terms or conditions whatever. The suit is for ten thousand dollars damages. The agreement mentioned in plaintiff's declaration between John K. Archer and others to the city council of Greenville is made an exhibit to the plaintiff's declaration. The proof offered by plaintiff in this case tended to establish the allegations of the declaration and actual damages were shown in incidental expenditures and depreciation in the value of his property, occasioned by the refusal of the municipality to furnish him with water.

A motion to exclude plaintiff's testimony in this case was sustained upon the theory that in refusing to pay the water rent and in refusing to pay the damages demanded of plaintiff the contract to furnish him with water was terminated. The contract to furnish this water, however, is a covenant running with the land, and as long as Mr. Carmichael was the owner of the property in question he had a right while subscribing to reasonable regulations made by the city to be furnished with water. Because he was delinquent in the payment of his water rent would not extinguish this right. It is, of course, a reasonable rule that, if a consumer is delinquent in the payment of his water rent, the same may be cut off until the rent in arrears is paid, and any other reasonable rule assuring the city of getting pay for its water may be enforced. After Mr. Carmichael's water had been cut off, upon a tender of the amount due, he had a right to have the water again connected on such reasonable regulations as is required of other persons. The municipality cannot flatly refuse, because Mr. Carmichael was once delinquent, to connect him again with the waterworks when he tenders all he owes.

The regulation requiring the payment of an additional dollar because the plaintiff was delinquent in his water rent is unreasonable and void, and has been so held in this state. *Ford v. Vicksburg Waterworks Co.*, 102 Miss. 717, 59 So. 880, 43 L. R. A. (N. S.) 63.

Reversed and remanded.

CHICAGO PORTRAIT CO. v. MADDOX

[73 South. 278, Division B.]

PRINCIPAL AND SURETY. *Action on surety bond. Evidence.*

In an action by a portrait company on a bond of its district manager given for the faithful performance of his contract, plaintiff made out a *prima-facie* case for recovery when it showed the balance due from the manager and no extension of time without the consent of the sureties or other action releasing them from the bond.

APPEAL from the circuit court of Lincoln county.

HON. J. B. HOLDEN, Judge.

Suit by the Chicago Portrait Company against J. W. Maddox and others. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Brady & Dean, for appellee.

Appellant, knowing as does this court, the legal learning and ability of appellees' counsel, is constrained to believe that the cases cited on page 5 of appellee's brief in support of their man of straw were not read before being inserted, for the rules therein announced fit absolutely appellant's contention on this record. We cite: "That sureties upon a bond given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming in to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employee." 21 Am. Rep. 321.

The evidence of fraud and dishonesty is patently absent from this record. The agent of a corporation,

being under bond to account and pay over daily, cannot be trusted with more money at his surety's risk after dishonesty of the agent is discovered by the corporation. But he may be so trusted so long as the circumstances, fairly interpreted point, not to moral turpitude, but to want of diligence or punctuality rather than to want of integrity." 27 Am. Rep. 402.

Here there is no evidence of dishonesty, and any interpretation of circumstances is for the jury and not the court. To the same effect is 10 So. 539.

The argument with reference to application of credits beginning on page 5 of appellee's brief has been somewhat anticipated on page 3 herein.

Appellees have taken a stated principle of law, knocked an "if" from in front of it, then stretched the facts of this record to meet their new-born proposition. 32 Cyc. 172 says: "*IF*" neither the creditor nor the principal has made any application of a payment made by the latter, and their transaction afterward become a matter of judicial adjustment, the court will apply the payment as equity seems to require, usually to the oldest item, unless the conduct of the parties indicates the payments by the principal were to be credited to later items. In some cases application will be made ratably among different debts."

This is widely different from "The rule as to the application of payments is left largely to the discretion of the trial court to be applied according to the equity and justice of the case," as is laid down on page 6 of appellee's brief.

The cases cited all have to do with credits on one account, or with limitation, or with principles even further afield than those matters. According to appellee's contention, their account ceased at a certain point, and another account began with which they had nothing to do. Now, they will take every credit of the second account (not just a credit balance) to apply to the balance due on the first totally disconnected account.

Who says that there has never been any exact and accurate account submitted or disclosed to the court? Appellees in their brief. What do they call an account where every debit and credit item during a period of years is plainly and clearly set down, with its true and proper date? Is it wrong? Where is their proof? Did their liability cease at a certain point? Then indebtedness for which they are liable is readily ascertainable. Were other articles of value turned over to Maddox thereafter? Then they are not liable for them, and they cannot be charged with them. When Maddox accounted for those later entrusted articles, is the entire credit side of that statement to be credited to them? Not much; yet that is their claim analysed.

J. W. McNair, J. A. Naul and Jones & Tyler, for appellee.

If the company was dealing fairly with the sureties why did they not keep them advised of these tremendous and heavy accounts which they held against Maddox? If good faith did not require this notice common business prudence did and the plaintiff in continuing Maddox in its employment after these large sums of money became due and extending to him time for their payment and allowing Maddox an opportunity to work and redeem himself released the securities. This was an extension of time without the consent of the sureties and operated as their release. *Govan v. Binford*, 25 Miss. 151; *Picard v. Shantz*, 70 Miss. 381.

The change of employment from district manager to that of crew foreman terminated the contract with these sureties and they cannot be held liable for shortage occurring after this change of employment. The duties of a district manager were evidently different from the duties of a crew foreman. If the duties were different then it required a new contract and any contract to which the sureties were not a party

and not contemplated and covered by the terms of their bond cannot be binding on them.

Nothing is said about changing from one position to another in the contract of suretyship and the rule with reference to the liability of sureties is *strictissimi juris*.

In the case of continuing suretyship for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the service, and if, instead of dismissing him, he continues him in his employ without the consent of the surety, express or implied, the latter is not liable for any loss arising from the dishonesty of the servant during the subsequent employment. This rule applies as well to a private corporation as to an individual, when its agent in the discharge of his duties, discovers the dishonesty of the servant, and having authority, fails to give notice of such dishonesty to the surety, and the corporation thereafter retains the servant in its employ. *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, 10 So. 539 and 36 Am. St. Rep. 210; *R. R. Co. v. Dow*, 59 Ga. 685, 27 Am. Rep. 403; *Telegraph Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621.

But it appears to have been if the retention of the principal did not operate as a release, to the advantage of the sureties that he was retained. In the first place the servant could not have become so heavily involved if the plaintiff had shown the necessary diligence, but in the next place the shortage was discovered. On September 17, 1907, it appears to have been one thousand, four hundred and ninety-eight dollars and eighty-one cents. Maddox was not discharged but continued until in September 29, 1908, when he tried to resign. It does not appear what he owed at this time, but on November 14, 1908, the debt was fourteen thousand, four hundred and forty-one dollars and nine cents, he is said to have disappeared, but on June 12, 1909 he owed one thousand, nine hun-

dred and sixty-six dollars. On March 25, 1901, he owed one thousand sixty-nine dollars and forty-five cents.

Taking any of these dates, or taking the date of the last item shown in the account sued upon which is September 10, 1910, it is shown by the testimony that there was paid by Maddox to the plaintiff the sum of two thousand nine hundred and thirty-six dollars and ninety-three cents, after the shortage is and was discovered. See answer of witness to thirty-seventh interrogatory. The sureties are entitled to have these credits applied so as to be most beneficial to them and to the oldest items in the account. So applied, the payments far exceed the amount of Maddox shortage at any time and they also exceed the amount of the penalty in the bond and the sum which the sureties agreed to become responsible for. 32 Cyc. 172; *Ida County Savings Bank v. Sendenstricker*, 128 Iowa 54, 111 Am. St. Rep. 189; 2 Am. & Eng. Ency. L. (2 Ed.), 462; *Fletcher v. Gillan*, 62 Miss. 8; *Mortimer v. McKay*, 1 Miss. 585; *Miller v. Leflore*, 32 Miss. 634.

STEVENS, J., delivered the opinion of the court.

This is a suit upon a bond executed by J. W. Maddox, district manager of the Chicago Portrait Company, as principal, and Carroll Bardwell, J. I. Smith, and C. W. Maxwell, residents of Lincoln county, Miss., sureties. The bond was given to secure the faithful performance and execution of a certain contract between Maddox and the Chicago Portrait Company, designated "a district manager's contract." The Chicago Portrait Company instructed this suit as plaintiff in the court below to recover the balance of an indebtedness due it by Maddox. When the plaintiff rested its case the defendant sureties moved to exclude the testimony and to grant them a peremptory instruction. This motion was by the court sustained,

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and judgment accordingly was entered in favor of the defendants, and from this judgment appellant appeals. A detailed statement in this opinion of the pleadings and the evidence would be burdensome and very uninteresting. It is sufficient to say that we have read the record and the undisputed testimony calls for a denial and is sufficient to put the defendants to proof. The testimony of the plaintiff does not admit or show an extension of time without the consent of the sureties, and there is no admission of fraud or such bad faith as would estop the plaintiff. We see nothing in the contract denying to the parties the right to change the territory in which Maddox was to operate without the consent of the sureties. There is nothing in the contract, or the proof, to show any obligation on the part of the Chicago Portrait Company to notify the sureties of the monthly balances due by Maddox. There was manifestly much delay on the part of Maddox from time to time in making payments upon his running account, but these delays indicate nothing more than indulgences on the part of the creditor, and should not operate as a release of the sureties. There were no representations made by the Chicago Portrait Company to the sureties to induce them to sign the bond. The sureties signed at the solicitation of Maddox, and not of the plaintiff. It may be conceded that the sureties undertook much when they undertook to answer for the default of their principal growing out of transactions in another state, but there is nothing in the contract or the bond itself to restrict these operations to Mississippi. It was a hard contract for the sureties, and possibly their testimony may disclose to the satisfaction of the jury a perfect defense. As the bond has been written and denominated by the parties, so must it be.

Reversed and remanded.

BANK OF SHAW v. RANSOM.

[73 South. 280, Division B.]

1. **BANKS AND BANKING.** *Collections. Relation between bank and depositor for collection. Duty to collect in money. Time of payment. Failure to collect. Notice.*

The collecting bank is the agent of the depositors of the claims for collection and it is the duty of such collecting bank to collect in money.

2. **SAME.**

A collecting bank cannot extend the time of payment.

3. **COLLECTION.** *Failure to collect. Notice.*

A collecting bank must use diligence to protect parties who intrust them with the collection of commercial paper; and such bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customers of such vital condition, and fails to take vigorous methods under the circumstances to secure payment, and if loss occurs by its negligence to exercise that degree of skill, care and diligence which the nature of its undertaking calls for, with reference to the time, place and circumstances surrounding the undertaking, it will incur liability to its principal for the loss sustained.

APPEAL from the circuit court of Boliver county.

HON. W. A. ALCORN, Jr. Judge.

Suit by W. A. Ransom against the Bank of Shaw.

From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Cutrer & Johnson, for appellant.

The question presented by this record briefly stated is, if a bank receives for collection a check drawn against another bank in the same town during the afternoon and on that afternoon presents the check for payment and payment is refused whereupon the collecting bank protests the check on the following day upon which day

the bank against which the check is drawn fails, is the collecting bank liable to the payee of the check in damages for the amount of the check notwithstanding the fact that both the drawee and payee of the check had actual knowledge of its dishonor and of the failure of the bank within twenty-four hours after the dishonor, and notwithstanding the further fact that at the time of the dishonor the bank against which the check was drawn was hopelessly insolvent.

But for the attitude of the learned trial court it would occur to us that to simply state this proposition would be to answer it in the negative. The defense here relies upon several distinct grounds of defense and we will discuss them in the following order:

First, that the check was not such a paper as is required by the commercial law to be protested in order to hold any party to the check for which reason there can be no liability upon a collecting bank for failing to protest a check unless it be shown that an actual damage was sustained because of the failure to protest.

Second, that the purpose of protest is to give notice of the dishonor of a piece of paper and where actual notice of this dishonor is had prior to the time when notice by protest could have been received, the failure to protest will not create a liability except where a special damage can be shown to have resulted from the failure to protest.

Third, that the state bank was hopelessly insolvent and entirely without funds on the day the check reached Shaw; that for this reason notice and protest would not have helped appellant.

Fourth, that the evidence fails to show that the plaintiff who is the appellee here, sustained any sort of damages because of the failure on the part of the collecting bank to protest the check.

The trial court took the position that the failure on the part of the collecting bank to protest the check, on the afternoon of December 20th was an act of negli-

gence in itself and that this negligence was the cause of loss to the plaintiff. We confess our inability to follow the trial court in any line of reasoning which reaches this conclusion. We might assume that the failure on the part of the bank of Shaw to protest the check on the evening of December 20th was an act of negligence, still we submit it did not follow that the Bank of Shaw thereby became liable to Ransom because nowhere in the record does it appear that the failure on the part of the Bank of Shaw to protest the check was either the proximate or the remote cause of any damage to Ransom. Magee on Banks and Banking (2 Ed.), page 211, article 276; *West Branch Bank v. Fulmer*, 45 Am. Dec. 651; *Bank of Rochester v. Montehath*, 43 Am. Dec. 681.

We next submit that had the check been duly protested neither Ransom or Scott could have done anything other than what was done. We also submit that a collecting bank is not liable for the failure to present and make demand for payment of a check and for failure to protest where the bank upon which the check is drawn is without funds. "Second Ransom Commercial paper, section 1347; *Ransom v. Wheeler*, 12 Abb. Proc. (N. Y.), page 139, 7 Cen. Dig, pages 1463-66.

Where a bank receives a check for collection and presents it upon the next day after receiving it, this has been repeatedly held to be presentation within a reasonable time to hold both drawee and endorser. *Veazie Bank v. Winn*, 46 Maine 60, 7 Cent. 1466; Dec. Dig. by Bills and Notes, section 402; *Anderson v. Gill*, 47 Asr. 402; *First National Bank v. Buchanan*, 27 L. R. A. 322; *Noble v. Doughten*, 3 L. R. A. (N. S.), 1167. Finally, we submit that there is nothing at all in the evidence tending to show liability on the part of the Bank of Shaw but even if there was, the question of whether or not the Bank of Shaw was guilty of negligence and as to whether or not this negligence was the proximate cause of loss to Ransom should have been

properly submitted as a question of fact to be determined by the jury.

A collecting bank is only required to use care and diligence in the collection of a check and is not liable to the payee of the check unless the payee can show that the collecting bank was guilty of negligence and that such negligence was the proximate cause of the damage.

Thos. S. Owen, and Thos. B. Lytle, for appellee.

First, the Bank of Shaw, the appellant, when it received the check for collection, was the agent of the appellee for the collection of the check.

Second, if an agent is negligent in the handling of the principal's business to that extent that causes loss to the principal, the agent will be responsible for the loss.

Third, when a bank presents a check to the payee bank for payment it is its duty to either receive money in payment of the check or to immediately protest the check and give the necessary notice to the parties in interest.

Fourth, when a bank presents a check for collection, it can only receive money in payment of the check, and if it receives any other thing than money it does so at its peril.

Fifth, when a bank presents a check to the payee bank for payment and the payee bank induces the bank presenting it to grant an extension or accept things other than money, the collecting bank extending the credit receives the exchange or other thing taken in payment as its own and not as the property of its principal for whom it is acting as agent.

Under the first heading, to-wit: that the Bank of Shaw was the agent of the appellee in collecting of the check, we refer the court to 5 Cyc. 493, subsection "B," where the rule is stated as follows: "Generally the depositor is the owner of the checks and other paper deposited by him for collection, and the bank performs

the service of collecting as his agent. While this relationship in many cases is created by endorsement and deposit of the paper without other action, in others it is created by special agreement and endorsement of the paper. In making collection for nondeposits, the bank acts as an agent until the completion of the collection and return of the proceeds to the employer." 148 U. S. 50, 27 L. Ed. 363.

In 7 C. J. 597, the rule is stated as follows: "As a general rule checks and other papers deposited in any bank for collection remain the property of the depositor, and the bank performs the service of collecting as his agent."

The Bank of Shaw being the agent of Mr. Ransom, a non-depositor, for the collection of this check, received it on the 20th of December and presented it to the First State Bank of Shaw the payee, for payment. When this was done it was the duty of the appellant to collect the proceeds of the check and to receive only the money. 7 C. J. 614, 615; Moss on Banks & Banking, sec. 242; Magee on Banks & Banking, sec. 277; 5 Cyc. 505; Secs. B. and C. Am. Ann. Cases 1912-B, 115; *Essex County Nat'l Bank v. The Bank*, 8 Fed. Cases, 789. Case 4532; *Bradley Lbr. Co. v. Bradley County Bank*, 206 Fed. 41; *Nat'l Life Ins. Co. v. Mather*, 118 Ill. 491; *Whitney v. Esson*, 99 Mass. 308; *Nat'l Bank of Commerce v. Am. Exchange Bank*, 151 Mo. 320; *Middling Nat'l Bank v. Brightwell*, 148 Mo. 351; *Lander v. Traders Bank*, 118 Mo. App. 356; *Gowling v. American Express Co.*, 102 Mo. App. 366; *Donogh v. Gillespie*, 21 Ont. A. 292; *Entigo Bank v. Union Trust Co.*, 149 Ill. 343; *Brown v. Leckie*, 43 Ill. 497; *Bickley v. Chicago First Nat'l Bank*, 42 Ill. 238; *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769; *Chaney v. Libby*, 134 U. S. 68; *Omaha Nat'l Bank v. Kipper*, 82 N. W. 102; *Bank & Trust Co. v. Thornton*, 174 Fed. 752.

When this collection was presented to the first state Bank of Shaw and the same was not paid, the Bank of

Shaw, being the agent of the appellee, confesses through the testimony of its cashier that they knew of its insolvent condition, and that being true, it became necessary for them to use every effort to collect the check in money, or to immediately notify the maker and its principal.

The rule is stated by the supreme court of West Virginia in *Pinkney v. Canawa Valley Bank*, 68 W. Va. 254, to be as follows: "A collecting bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customers of such vital condition and fails to take vigorous methods under the circumstances to secure payment and if loss occurs by its negligence to exercise that degree of skill, care and diligence which the nature of its undertaking calls for with reference to the time, place and circumstances surrounding the undertaking, it will incur liability to its principal for the loss sustained."

In this instance the appellant was the agent of the appellee; it confesses that it knew the depressed financial condition of the First State Bank, and knew that the Exchange which was given it by the First State Bank in clearance was not good and would not be until possibly the next day, and yet, it took no steps to protest the check, to notify the principal by wire or otherwise on the 20th, and took no steps to notify the maker of the check who resided four miles from its place of business, with a telephone in his house and one in each bank, and with two mails a day between the two places, until after the failure of the First State Bank, more than twenty-four hours after the receipt of this check for collection, and presented it for payment and did not receive payment.

The duty of a bank when it receives paper for collection is to use due diligence in making the collection, particularly with regard to presentment, protest and the like.

Magee on Banks & Banking, at page 506, states the rule as follows:

"The general rule is again stated, that the bank in receiving a collection must use ordinary care and diligence towards its collection. The diligence and care required depends largely upon the circumstances arising in each case."

Magee on Banks & Banking, section 275, referring to the presentment of checks, lays the rule down as follows: "It must be presented within a reasonable time after its receipt for collection, and as to what constitutes a reasonable time depends upon the circumstances of each case."

Section 277 of the same work lays down the further rule as follows: "A bank is authorized to receive money only. If it receives checks, drafts or other evidence of the debt, by doing so it takes them at its own risk and will be held responsible in money to the owner of the collection."

It will be remembered that a check, when presented, is different from a note; it has no days of grace, but the same must be paid when presented, and the court in *Bank of Utica v. Bank of New York*, 9 N. Y. 582, states the rule as follows: "A collecting agent has no right to receive any sort of explicit and unequivocal acceptance without giving notice to the owner as in case of non-acceptance, and he will be liable for any loss the owner may sustain in consequence of his neglect so to do."

A bank having a check for collection has no authority to grant an extension of credit to the payee bank, and if it does so the credit is its credit and not that of the customer. Ruling Case Law, p. 618, section 246.

5 Cyc. on page 505, section 5, states the rule as follows: "The collecting bank has no authority to renew the debtor's obligation or to give him an extension unless expressly authorized."

It will thus be seen that when the Bank of Shaw presented the check and did not receive the cash but extended the time of payment until the next day they did so without authority of law and the credit that they extended was their credit and not that of Mr. Ransom.

The error assigned by appellant bank, through its learned counsel, may be condensed in one statement, to-wit: the *nisi* court committed error on the facts proven before it and contained in the record here, in directing a verdict for appellee.

In order that the court may not have the issue between the parties paralyzed and totally devitalized by the statement of the legal proposition, as contained in the brief of counsel for appellant, it is deemed proper here to direct the court's attention to the only issue arising from the pleadings under the facts in this cause. This issue should be grouped under three heads, as follows: 1. That there was an actual payment by the drawee bank to appellant bank of the check in question; or 2. That the acts and conduct of appellant bank in handling said check with the drawee bank were such as that by operation of law the same amounted to a payment thereof; or 3. That the conduct and action of the appellant bank in its transactions with the drawee bank amounted to such gross negligence as to discharge the original maker of said check in question, thereby fixing the liability to appellee for the payment of said check, upon the appellant bank.

The appellant bank utterly disregarded in said transactions its legal duties as the collecting agency and totally failed to perform the duties imposed upon it as such by law.

Discussing these matters under the heads designated, counsel will now call the court's attention to the first

proposition raised herein, which is: "That there was an actual payment by the drawee bank to appellant bank of the check in question." *Bank of Utica v. Bank of New York*, 9 N. Y. 582; *Kirkman v. Bank*, 26 App. Div. (N. Y.) 110; *Bank of Pennsylvania v. Bank of New York*, 89 N. Y. 412.

Recurring now to the second proposition, which is "that the acts and conduct of appellant bank in handling said check with the drawee bank were such as that by operation of law the same amounted to a payment thereof."

Counsel will undertake to show to the honorable court that the acts of the appellant bank amounted to a payment by reason of its said conduct and acts in handling said check. *Morse on Banks and Banking*, sec. 240; *Cyc.* page 509; 132 Penn. St. 118; *Bank v. Ashworth*, 123 Penn. St. 212; 13 Iowa, 256; *Bowling v. Arthur*, 34 Miss. 41; *Bank v. Lane*, 52 Miss. 677. Recurring now to the last proposition, which is as follows: "That the conduct and action of the appellant bank in its transactions with the drawee bank amounted to such gross negligence as to discharge the original maker of said check in question, thereby fixing the liability to appellee for the payment of said check upon the appellant bank."

The court's attention is directed to the case of *Pinkney v. Bank*, reported in 680 Va. 254; *Exchange Bank v. Bank of West Virginia*, 132 Mass. 147; *Bank v. Kenan*, 76 N. C. 340. In associate's brief filed herein many authorities are cited, conclusively demonstrating to the court on a casual perusal thereof the propositions laid down in this brief.

Counsel strenuously insists that there was no error committed by the *nisi* court and insist that its judgment should be affirmed; and with the suggestions herein made, counsel now remains content.

Cook, P. J., delivered the opinion of the court.

The appellant is a banking corporation, and was doing a regular banking business at Shaw. In the same town was another bank called the State Bank of Shaw. Appellee owned a plantation four miles south of Shaw, which he had leased to one T. R. Scott. On December 13, 1911, T. R. Scott was indebted to appellee in the sum of two thousand five hundred and fifty dollars, and, having at that time more than that amount on deposit in the State Bank of Shaw, drew his check for that amount payable to appellee, and mailed same to appellee at Murfreesboro, Tenn. Appellee received the check in due course of mail, and he placed the same with his home bank for collection. In the due course of business the bank at Murfreesboro forwarded the check to a Nashville bank for collection, and that bank in turn, forwarded the check to a New Orleans bank for collection, and the last-named bank forwarded same to the appellant bank on the 18th day of December. The appellant bank received the check for collection on the 19th or 20th of December, 1911. When this check was received by the appellant bank, the executive officers of the bank were advised that the State Bank, the drawee, was probably in financial straits; in fact, from the information in their hands, the appellant believed that the State Bank was hopelessly insolvent.

It was the custom of the two banks of Shaw to make clearances each day. The debtor bank would then give to the creditor bank a check to cover the balance due on clearance. In this instance the appellant, it seems, was unwilling to take the check of the State Bank in settlement of the balance, but it nevertheless appears that the check in question was taken and was stamped paid by the appellant, but it was not delivered to the State Bank. The appellant's defense seems to be that it refused to take the check of the

State Bank in payment, but merely received it to ascertain whether the Memphis Bank, on which the exchange was drawn, would pay it. The exchange was not forwarded to the Memphis bank, but the next day the appellant protested the check which is the subject of this controversy. The reason assigned for not protesting promptly was that the appellant hoped that the officers of the bank would come to the rescue of the insolvent institution.

Mr. Ransom sued the appellant for the amount of the check, upon the theory that it was the duty of appellant to have protested the check when payment was refused, that the bank was charged with the duty to get the cash, or, failing to do so, it was the duty of the bank to immediately protest same, but if it chose to adopt another course, and receive the exchange tentatively, that the appellant thereby accepted the risk of this irregular procedure, and is liable to appellee for the full amount of the check.

The appellant contended that Mr. Ransom was notified of the nonpayment of the check long before he could have received notice of protest if the appellant had promptly protested the check; in other words, that the course adopted by appellant was the readiest means to advise Mr. Ransom that the check could not be collected, and the regular way, had it been followed, would not have afforded any way through which Mr. Ransom could have saved himself.

The record shows that Mr. Scott, the drawer of the check, lived within four miles of the town of Shaw; that there were two daily mails between Mr. Scott's post office and the Shaw office; that there was telephone connection between Mr. Scott's home and the office of appellant; yet, with the check in its hands for collection, and with knowledge that the payee bank had not paid the check on presentation, and believing that the exchange accepted by it would most probably not be paid, the collecting bank nevertheless failed to

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protest and failed to take any steps to notify Mr. Ransom or Mr. Scott of the situation. The bank took the exchange and waited for results.

With these facts before the trial court, the jury were peremptorily instructed to find a verdict for the plaintiff, Mr. Ransom, against the defendant, and defendant appealed to this court.

The collecting bank is the agent of the depositor of the claim for collection. 7 C. J. 54. It is the duty of the collecting bank to collect in money. 7 C. J. 614, 615, and authorities there cited.

The supreme court of West Virginia lays down the following rule controlling situations like the one mirrored by this record, viz.:

"A collecting bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customer of such vital condition, and fails to take vigorous methods under the circumstances to secure payment, and if loss occurs by its negligence to exercise that degree of skill, care, and diligence which the nature of its undertaking calls for, with reference to the time, place, and circumstances surrounding the undertaking, it will incur liability to its principal for the loss sustained." *Pinkney v. Bank*, 68 W. Va. 254, 60 S. W. 1912, 23 L. R. A. (N. S.) 987, Ann. Cas. 1912B, 115.

A collecting bank cannot extend the time of payment. R. C. L.; 5 Cyc. 505.

The authorities are numerous and uniform to the effect that collecting banks must use diligence to protect parties who intrust them with the collection of commercial paper. This is elementary law and we do not deem it necessary to cite authorities to support the obvious.

We have stated the recorded facts as favorable to appellant as possible. There is much evidence less favorable to its contention. There can be no doubt that appellant was negligent, that it not only elected to

take chances by delaying the protest, but it is clear that its officers made no effort to protect the interest of Mr. Ransom.

In conclusion we desire to say that the acceptance of the exchange under the circumstances was dangerously near a payment so far as appellee's rights are concerned. It is unnecessary to go so far, however, as we think the judgment of the trial court was proper from the accumulated circumstances reflected in the record. This court has recently held that the collecting bank is the agent of the holder. *Mercantile Co. v. Armour Co.*, 109 Miss. 470, 69 So. 293.

Affirmed.

GULF EXPORT Co. v. STATE ET AL.

[73 South. 281, Division B.]

1. STATES. *Actions. Liability to suits. Sufficiency of bill. Officers. Authority. Auditor. Involuntary dismissal. Venue. Change. Defendant's residence.*

Under Code 1906, section 4800, so providing, persons having claims against the state must submit them to the auditor before suit and an action cannot be brought upon such a claim which the auditor has no authority to audit and allow.

2. STATE. *Actions. Sufficiency of bill.*

A bill in equity against the state for alleged breach of a contract made by the governor with the complainant, but not showing any authority on the governor's part to make the contract, does not show a binding contract on the state.

3. STATE. *Actions. Officers. Authority. Auditor.*

The auditor of the state has no authority to audit and allow a claim for damages for breach of contract.

4. STATES. *Actions. Liability to suit.*

A chancery court has no general equity power to decree what the state should pay for an alleged breach of contract. The au-

thority to sue the state has always been a subject of legislation in this state and the legislature having dealt with and treated the subject, its treatment and its statutory enactment must be regarded as exclusive of any remedy by common law or original equity jurisdiction.

5. *STATE. Actions against. Involuntary dismissal.*

Where a bill does not state such a claim for which suit is authorized to be brought against the state in its sovereign capacity, the chancellor is authorized to dismiss such suit, as to the state.

6. *VENUE. Change. Defendant's residence.*

Where a suit against the state and several other defendants was dismissed as to the state and none of the other defendants lived in the county where the suit was brought, the venue was properly changed to the county, of the residence of the principal defendant.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Bill by the Gulf Export Company against the state of Mississippi and others. From a decree dismissing the suit as to the state and a change of venue as to the other defendants, plaintiff appeals.

Appellant instituted this action in the chancery court of Hinds county against the state in its sovereign capacity and against Earl Brewer, at that time Governor, and W. A. Montgomery, P. E. Matthews, and J. F. Thames, trustees of the state penitentiary. The bill claims damages for the alleged breach of contract charged to have been entered into between complainant and Earl Brewer as the Governor of the state, by the terms of which complainant was to transport on the steamship "Huso" a cargo of cotton grown on the state farms. The cotton was to be carried from Gulfport to Copenhagen. The bill charged that the contract is evidenced by certain correspondence and telegrams set forth in the bill. There does not appear to be any express contract with the trustees of the state penitentiary to ship the cotton in question, and the trustees declined to ship the cotton after some disagreement between themselves and complainant

about the insurance on the cargo. The bill does not show any authority on the part of the Governor of the state to enter into the contract, but charges that "Brewer had assumed to bind the state of Mississippi," and at another point that "said Earl Brewer, assuming to act for said state, sought to change the contract made as aforesaid, but said complainants declined so to do." Another paragraph of the bill avers that "the liability is either upon the said Earl Brewer or the state, but which is liable your orators are unable to say, but aver that this depends upon the solution of a question of fact as to which there is no adequate remedy at law, and said suit cannot be safely determined, except in equity where all of the facts may be heard and the liability may be imposed in accordance with the law." It is charged complainants would have received seventy-eight thousand three hundred and seventy-five dollars for the tonnage if the state had carried out its contract, but that when it refused to make the shipment, complainant sold the tonnage to Boyce & Co. of Memphis, Tenn., for forty-five thousand six hundred dollars, and the latter company bought the cotton from the state and diverted the shipment to other points. The trustees of the penitentiary were made defendants, but there is no prayer for relief against them individually. The bill claims the right to recover the sum sued for "either from the state of Mississippi or from the said Earl Brewer." It is alleged that demand was made upon the auditor for an audit and allowance of the claim sued for, but the auditor had failed and refused to allow the claim.

The state in its sovereign capacity filed a motion to dismiss the suit as against the state for want of jurisdiction in the court to entertain the suit made by the facts stated in the bill, and because there is no statute authorizing any such suit against the state, the claim sued on being one which the auditor has

no authority to audit and allow and the suit made by the pleadings not being such as is contemplated and allowed by section 4800 of Code authorizing suits against the state. No one of the individual defendants sued is a resident of the first district of Hinds county where the suit was instituted, and these defendants entered a motion for a change of venue. The chancellor sustained the motion to dismiss the suit as against the state and also changed the venue to Coahoma county where the defendant Earl Brewer is domiciled. An appeal was prayed for and granted from the decree entered in order to settle the principles of the case.

Green & Green, for appellant.

Geo. H. Ethridge, Assistant Attorney-General for the state.

STEVENS, J., delivered the opinion of the court.

Section 4800 of the Code defines and measures the right of any one to sue the state in its sovereign capacity. This section of our Code has been judicially interpreted by our court, and it only remains for us to follow the path which our legislature and court has surveyed and blazed out. To support a suit against the state, the claim must be a claim which the auditor has authority to audit and to allow,

The claim here sued on is not of that character. The bill in the first place does not show any binding contract on the part of the state; and in the second place, should we concede the validity of the contract, the action here is one for damages for the breach thereof and the determination of the amount of damages would require "evidence and counter evidence for its adjustment, and the adjudication of some tribunal for fixing the same." As stated by TERRAL, J., in *Hall v. State*, 79 Miss. 38, 29 So. 994:

“The auditor could not audit this claim, and it is not insisted in argument that he could do so; and, because it is not a claim which he could audit, we think it is not capable of supporting a suit.”

Before the decision in the Hall Case was announced our court by TERRAL, J., announced in *State v. Dinkins*, 77 Miss. 874, 27 So. 832, that:

“A claim against the state for which suit may be brought must be such as the auditor of public accounts must audit as the ministerial officer of the state for that purpose, under paragraph 4248 of the Annotated Code (1892).”

Counsel for appellant by oral argument and brief has traced in a most interesting way the history of the statute conferring the right to sue the state, and contends with much persuasion that equity has jurisdiction to inquire into the rights and claim of appellant, and to enter a decree adjudicating the equity of the claim without entering a monetary judgment; that the chancery court under general equity jurisdiction would have the right to enter a decree that would be monitory but not mandatory upon the sovereign, and that upon the faith and persuasive force of this decree appellant could then approach the Legislature and ask for an appropriation. It is argued that under *Farish v. State*, 2 How. 826, and *State v. Mayes*, 28 Miss. 706, it was competent to institute a suit in equity similar to that which at one time could be instituted in England under a petition *monstrans de droit*. Upon a reconsideration of the Farish Case as disclosed by the opinion in 4 How. 170, our court did not hold that the remedy by *monstrans de droit* could be availed of in a court of chancery in Mississippi. The court in the Farish Case had under consideration the constitutionality of the act of 1833 (Hutchinson's Mississippi Code, p. 769) giving the right to any person having a just claim against the state of Mississippi to exhibit and file a bill in equity against the state. What the court

held in the Farish Case as that under the provisions of the Constitution and the act of the legislature of 1833, authorizing suits against the state to be instituted in a court of chancery, such suits could be brought in equity against the state as expressly declared by the statute, and that the remedy conferred by the statute was "quite analogous to the exhibition of the bill in our court of chancery" in England whereby the remedy by *monstrans de droit* was prosecuted. The opinion says that:

"No reason can be perceived why the chancellor should not be suffered to perform the same conscientious office for our government."

But under the Farish Case there was express authority conferred by the Constitution and statute then under review. The court did not rely upon general equity jurisdiction. The authority to sue the state has always been a subject of legislation in Mississippi, and the legislature having dealt with and treated the subject, its treatment and its statutory enactment must be regarded as exclusive of any remedy by common law or original equity jurisdiction. The reason for this is apparent. In America there is not and never has been such a thing as a king. Our system of government is entirely different. Here, we have constitutional governments and, as stated by TERRAL, J., in *State v. Dinkins, supra*:

"The legislative, executive, and judicial branches of government are co-ordinate, equal, separate and independent departments of government, and that the powers and duties of one of these departments cannot be performed through the instrumentalities of one of the other departments of the government."

Under section 63 of our Constitution:

"No appropriation bill shall be passed by the legislature which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury."

And the auditor cannot allow a claim for which no appropriation is made. If he refuses to audit and allow a claim over which he has jurisdiction, then the complaining party may sue the state. If the claim is one which the auditor cannot audit and allow the complaining party can and must seek relief from the legislature, one of the co-ordinate branches of our state government. Such is the meaning of section 4800 of the Code as already judicially interpreted by our court.

Counsel for appellant insist that the lower court had no right to look to the pleadings to determine whether or not the bill sufficiently states a claim against the state. To this we cannot agree. Appellant is bound by its own pleading, and if the bill does not state such a claim for which suit is authorized, then the court had no jurisdiction of the suit against the state. The action of the chancellor in dismissing the suit against the state in its sovereign capacity must be approved.

There was no error in changing the venue. This disposes of all questions presented for our decision.

Affirmed and remanded.

MISSISSIPPI BENEVOLENT MUT. AID ASSN v. BANKS.

[73 South. 283, Division B.]

INSURANCE. *Mutual benefit insurance. Reformation of policy to conform to application. Right of beneficiary.*

Where a member of a mutual benefit association made out and forwarded an application for life insurance which without his fault was lost and never received by the officers of the Supreme Lodge, and another application was executed and forwarded for him, which recited that it was only an application for a policy, which if granted, would become effective in thirty days after issuance; and a policy was duly issued and delivered which provided that if the member's certificate had not been in force thirty days,

no benefit would be allowed in case of illness or death; and the member died less than thirty days from the date of issuance of the policy, in such case his widow, the beneficiary, could not have reformation of the policy so as to change its date to conform to the first application and thus render the benefit association liable.

APPEAL from the chancery court of Holmes county.
HON. JAMES F. MCCOOL, Chancellor.

Bill by Julia Banks against the Mississippi Benevolent Mutual Aid Association. From a decree for complaint, defendant appeals.

Appellant is a benevolent order or association domiciled at Hattiesburg, Miss., and writes fraternal insurance for its members. Appellee is the wife of one Stephen Banks, who joined the subordinate lodge of appellant association at Durant, Miss. Stephen Banks was initiated some time in April, 1910, and on or about April 20, 1910, made written application for a policy of insurance on his life, designating appellee as the beneficiary. For some reason this application was not received by the officers of the Supreme Lodge at Hattiesburg; and Banks, having failed to receive his policy promptly, made complaint to the officers of the local lodge, and thereafter, on May 31, 1910, another application was executed and forwarded for and on behalf of Stephen Banks. In pursuance of this application a policy in the sum of two hundred and fifty dollars was issued June 3, 1910, and duly delivered. Stephen Banks died June 23, 1910, less than thirty days from the date of the policy. The policy, otherwise termed a certificate, contains, among other things, the following clause:

"Provided again, that if said member's certificate has not been in force a full term and period of thirty (30) days, no benefits will be allowed thereon in event of illness or death."

And another provision as follows:

"Provided again, that no liability of said association shall ever extend to or cover any disability or death occurring under this certificate during the first thirty days following the date of its issue, or during the first thirty days following any renewal hereof."

The written application in question contains the following:

"I understand that this is nothing more than an application for a policy, the cost of which is three dollars and fifty cents, and if granted it will become effective in thirty days after the issuance of same as recorded on the books in the S. & D. of G. M. B. M. A. Association of Hattisburg, Mississippi. If not granted the said sum will be returned to the applicant."

After the death of Stephen Banks, appellee exhibited her bill in equity, asking for a reformation of the policy so as to change the date thereof to conform to the first application, and also to change the amount of the policy from two hundred and fifty dollars to three hundred and fifty dollars as originally applied for, and further praying for a personal decree for one third the face of the policy in accordance with the terms of the contract. The chancellor granted the relief prayed for, except as to the amount of the policy, and from this decree appellant appeals. There is no evidence that more than one policy was ever issued, or that the officers of the Supreme Lodge ever in fact received the first application.

T. C. Hannah and J. D. Guyton, for appellant.

When was the contract of insurance made and completed? A correct answer to this question is absolutely fatal to complaint's cause. Ordinarily when a person makes an application for insurance, and this is accepted according to its terms by the company, a contract of insurance is effected. But there must be a meeting of the minds of both parties before the contract is completed; and if, after consideration by the company,

a policy, different from the one applied for, is issued, the contract is not completed until the applicant accepts the policy tendered. Propositions and counter-propositions do not make a contract; before either party is bound, the proposition of one must be accepted by the other exactly as proposed; there must be a meeting of the minds on the same thing. *N. Y. Life Ins. Co. v. McIntosh*, 38 So. 775; *Jacobs v. Ins. Co.*, 15 So. 639, 71 Miss. 659. In the *McIntosh* case, application was made for a policy and the company issued a different policy. On delivery this policy was refused. On further consideration and evidence of insurability the company issued another policy to the applicant, more favorable than the first tendered him, but yet not the one applied for, and forwarded this to its agent for tender and delivery. The court held there was no contract effected. Later, the bill to enforce payment of this policy was amended so as to show that the company's agent had written the applicant that his application had been accepted and the company would issue a policy from the start on the plan applied for. The court held this good on the theory of estoppel. 41 So. 381.

In the *Jacobs* Case, the applicant died while the company was considering his application which was not approved. The court held there was no liability, notwithstanding there was an allegation that the application was refused arbitrarily and without cause.

"Mere delay in accepting an application for insurance which "is subjected to the approval of the company, although such" delay may be unnecessary, does not give rise to a contract "of insurance." 25 Cyc. 714.

"As a rule, until there has been a proposition for insurance" by the applicant and acceptance thereof by the company, "there is no contract," and the acceptance must be signified, "by some act on the part of the company." 25 Cyc. 713.

There is no difference between the formation of a contract of mutual benefit insurance and a contract of ordinary insurance. They are both governed by the terms of the application. I again call the court's attention to the terms of the application in the case at bar, heretofore quoted in this brief, to the effect that it is nothing more than an application and is not to be in effect until thirty days after a policy is issued and recorded on the books of the Association at Hattiesburg. The facts show that an application was made and forwarded to the office in Hattiesburg, which application was lost in some way, and never received at the home office. Another application was made on May 31st. After this was considered at the home office, a policy for two hundred and fifty dollars in consideration of the payment of monthly assessments of seventy-five percent was issued, and forwarded to the local lodge at Durant for tender and delivery. It was delivered and accepted. Julia Banks, the beneficiary, says her husband expressed himself at the time of delivery as being satisfied with the policy. Now the policy applied for was for three hundred and fifty dollars in consideration of the payment of monthly assessments of one dollar each. So we see that the Association never did issue the policy applied for, but a very different policy. This certainly constituted a counter-proposition on the part of the Association to the applicant, and no contract was effected between them until the applicant accepted this policy. The applicant did accept this policy at the time it was delivered him in June and expressed himself as being satisfied. At this time, and never before, was the contract in this case completed. This point is fundamental and all pervading.

W. J. Latham, for appellee.

There is very little in the opinion of the counsel for the appellee to be said in answer to the argument by counsel for the appellant. When the court will con-

sider the facts in this case; that they are all colored people and not versed in the strict rules of business; all being guilty alike of gross carelessness in the management of affairs of this character.

That the appellant in this case was a fraternal benevolent association operating on the lodge system, having a local lodge at Durant, to which Banks became a member; and that Banks had relied upon the representation or fact, that the local lodge was the agent of the supreme lodge, and that its acts as such agent, were binding upon the Supreme Lodge; and that when the local lodge at Durant accepted Banks as a member and accepted his money, paid by him as premiums on his policy, that these acts were binding upon the Supreme Lodge; and that by the Subordinate Lodge accepting his money, bound appellant to carry out the agreement made to Banks by the Subordinate Lodge.

It is clear in the record, that Banks paid the proper amount for a three hundred and fifty dollar policy; that he paid the premiums required to carry a three hundred and fifty dollar policy; and the fact that a two hundred and fifty dollar policy was issued without the explanation to Banks and without refunding the difference between a three hundred and fifty dollar policy and the two hundred and fifty dollar policy is not sufficient of itself to sustain a decree of the court that Banks is bound by the terms of the policy actually delivered to him.

It is clear from circumstances, without explanation, that it was a mutual mistake on the part of both concerned, that the policy was issued for two hundred fifty dollars instead of three hundred fifty dollars, or a fraud on the part of the Supreme Lodge, which was never observed, and which the insurance company could not afterwards take advantage of.

In other words, from the application originally made by Banks, and the money paid in the order by him, he was clearly entitled to a three hundred fifty policy,

if any at all, and the insurance company would not be permitted to collect the price of the three hundred fifty policy and the premiums for the same, then hold the insured up to a policy of less value. As the by-laws do not provide for different classes of persons, the association should be compelled to issue to all policy-holders the same character of policy for the same money. It evidently must have been the intention of the insurance company to do that very thing in this case or else to commit a gross fraud on the insured Banks.

STEVENS, J., delivered the opinion of the court.

Conceding that Stephen Banks was duly initiated and conformed to all the requirements in making out and forwarding his application, and that, without negligence on his part, the original application was lost or misplaced, it still appears beyond dispute that only one certificate of insurance was issued, and that the applicant died in less than thirty days from the date of the issuance of this certificate. By the express terms of the policy there can be no recovery. There is only one contract, and this contract was accepted by Stephen Banks in his lifetime. The written application itself indicates that the policy is effective, not from the date of the application, but from the date of the policy. It appears to be conceded by both parties that Stephen Banks would not be insured from the date of his initiation, or from the date of the written application, if no policy at all is issued. The policy or certificate is essential to the right of recovery. There was nothing about the written certificate or policy to be reformed. The officers of the Supreme Lodge by the undisputed proof never received the first application, and acted only upon the second application, whether it be termed a second or a duplicate. It would perhaps be gratifying to everybody to see the wife recover in this case, but under the law and facts she had no case.

Reversed and decree here for appellant.

Reversed.

HOUSTON BROS. v. GRANT.

[73 South. 284, Division B.]

CONVEYANCES. *Property conveyed. Actions.*

A deed conveying one hundred and seventy-five acres of land more or less, by metes and bounds, does not include three hundred other acres which by accretion had attached to the original tract before the conveyance.

APPEAL from the chancery court of Warran county.
HON. E. N. THOMAS, Chancellor.

Bill by Mrs. Vera W. Grant against Houston Bros.
From a decree for complaint, defendant appeals.

Mrs. Vera W. Grant, appellee herein, sued out an attachment in chancery against appellants as nonresidents of the state of Mississippi, to recover damages to have been sustained by her by reason of the alleged unlawful cutting of timber on a parcel of land in Issaquena county, ownership of which is alleged to be in complaint. The controversy arises out of conflicting claims to about three hundred acres, of accretions to lots 1, 2, 3, 4, and 5 of section 2, township 13, range 9 west, in said county. The accretions were formed by the Mississippi river. When the original government survey was made in 1829 the lots in question bordered upon the Mississippi river and ran approximately northeast and southwest, converging toward the river in a shape somewhat resembling the ribs of a fan. From the date of the government survey to November 11, 1901, the river had gradually shifted its course westward in such way that large accretions had been formed, amounting in area to three hundred thirteen and twenty-four hundred acres. On November 11, 1901, Smith and Moore, then owners, conveyed to M. McN. Grant one hundred seventy-five acres off the south end of these lots, and in their deed the property was described

by monuments, metes, and bounds. At that time the accretions had already formed and the land so added was elevated above the water line in such way as to be the subject of occupancy, and had growing upon it a large quantity of cottonwood, willows and other trees. It appears from the agreed statement of facts that Mr. Grant at the time of this conveyance did not know of the existence of the accretions, and also that Mrs. Grant, who received a conveyance for the one hundred seventy-five acres from her husband, did not know of the existence of the accretions at the time she became the owner of the land conveyed. In 1909 Smith and Moore, Mr. Grant's grantors, executed a conveyance to Dulaney and Foote for all of lots 1, 2, 3, 4, and 5 aforesaid, excepting that portion of said lots theretofore conveyed to Mr. Grant, and stated in the conveyance that all accretions to these lots were intended to be conveyed by this deed to Dulaney and Foote. Thereafter Dulaney and Foote undertook to convey the timber on the accretions to Houston Bros., appellants herein, who entered upon the lands and cut certain trees thereon. The purpose of this suit is to recover the actual value, as well as the statutory penalty for the cutting of the timber. In the deed from Smith and Moore to Mr. Grant the parcel of land conveyed is not only described by monuments, metes, and bounds, but concludes by saying, "being one hundred seventy-five acres, more or less, including all the cleared land on said lots." All of the lots in question were not conveyed, and none of the land was conveyed by Smith and Moore by lot numbers or by governmental subdivisions. The deed had a definite point of beginning, and traces the line from point to point in a way to indicate that the lines had been carefully surveyed for the purposes of this deed. The cause was heard on bill, answer, and agreed statement of facts, and a decree entered in favor of complaint, from which this appeal is prosecuted.

Dabney & Dabney, for appellant.

Counsel for appellee states correctly the law of accretion as applied to some cases; but not to the case at bar. When an accretion forms to a lot or section of land it becomes a part of that lot or section just as much so as the north part, the east part, the south part or the west part of the original lot or section. And where an entire lot or section to which an accretion has formed is conveyed, the accretion, being a part of that entire lot, goes with it; so where a lot is conveyed by number, in its entirety, without specifying what particular part or how much of said section or lot it is intended to convey, it carries with it whatever accretion may have formed thereto. That is common-place law, particularly in Mississippi where it has long been the established law of accretion. That, however, is altogether different from carving out of a lot or section a certain number of acres of land with the intention to convey that certain acreage and no more and describing that certain acreage by metes and bounds as in the instant case. In the latter, regardless of whether the particular acreage conveyed is situate in the north, east, west or central part of the lot or section and regardless, also of whether there is any accretion or not to the lot or section, the particular acreage included within the metes and bounds and no more, passes by the deed; and this is more emphatically the intent and purpose of the instrument where, in addition to the land surface within the stated metes and bounds being of a certain acreage by calculation, the acreage is particularly specified, and this acreage so specified agrees exactly with the amount of land within the bounds given in the deed.

None of the cases cited by counsel for appellee are applicable to the case at bar. The leading case—*Jeffries v. East Omaha Land Co.*, 134 U. S. 178, 33 L. Ed. 872, cited by appellee, correctly states the law of

accretion applicable to that particular case, but not to the instant case. There the contest was as to the ownership of the accretion to lot 4 in section 21, etc. One side of this lot abutted on the Missouri River; an accretion had formed thereto after a patent had issued to the lot by the United States Government; the lot had changed hands many times and always by the general description of lot 4, section 21, etc. In that case it was held, and correctly so: "Where a water line is the boundary of a given lot that line no matter how it shifts, remains the boundry; and a deed describing the lot by number or name conveys the land up to such shifting water line, etc.,"

Certainly it does, because when the accretion has formed it is as much a part of the lot as any other part of the lot theretofore in existence, and a deed describing the lot as lot unnumber 4, carries with it the entire lot, mainland and all. In the case at bar, had the description in the deed from Smith & Moore to Mr. Grant conveyed lots 1, 2, 3, 4, & 5 by their numbers, title to all of the accretion would have passed as a part of those lots; but, inasmuch as a tract of only one hundred seventy-five acres carefully carved out of the total acreage of over seven hundred acres of mainland and accretion was described in the deed by metes and bounds, only the one hundred seventy-five acres included within those calls passed and no more.

Again at page 878, quoting from *Jones v. Johnston*, 58 U. S. —, 18 How. 150, 15 L. Ed. 320; "and it justifies the view announced by the circuit court in its opinion that where a water line is the boundary of a given lot that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line, etc.,"

Again, p. 879: "All the grantors in the deeds made subsequently to the patent including the patentee,

described the land in their successive deeds as lot 4."

"But we think that in all the deeds the accretion passed by the description of the land as lot 4. In making every deed the grantor described the land simply as lot 4 and did not, by his deeds, nor does it appear that he has since or otherwise, set up any claim to any accretion. It must be held, therefore, that each grantor, by his deed, conveyed all claims not only to what was originally lot 4, but to all accretions thereto."

In the instant case not only did Smith & Moore not convey Mr. Grant any of the accretion but only a strip of the mainland carefully described in the deed so as to exclude all else, but afterwards conveyed the accretion to said lots to Dulaney & Foote.

In the case of *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415, cited by counsel for appellee, it is held, as in *Jeffries Case*, *supra*, that: "The boundary line of lot conveyed by its lot number" will carry with it as a part of the lot the title to the accretion. That is, where the whole lot is conveyed. The other cases cited by counsel for appellee are equally inapplicable to the case at bar.

Throughout his brief, counsel for appellee fails to distinguish between the cases cited by him where an entire lot is conveyed by its name or number (which, of course, carries the accretion, which is a part of the lot, with it), and the case at bar where a particular tract of land is carved out of a greater tract, the courses run the distance measured, calculations of area made, and all the metes and bounds and acreage fully set forth in the deed of conveyance. In such a case nothing passes by appurtenance and all that does pass is the area within the calls of the deed. We look to *Jones & Marsh v. Johnson*, cited in our brief in chief, to support us in this contention.

The case of *Jones v. Soulard*, 56 U. S. —, 24, How. 41, 16 L. Ed. 604, is cited in the *Jeffries Case*,

supra, as an authority that the owner of the riparian lands is also the owner of the accretion that forms thereto.

Counsel for appellee lingers long on the proposition which we do not dispute, that where a lot has a water front when originally platted that water front, it matters not how much or in what direction it shifts, is always the boundary of the lot. But because this water line shifts and vast accretions form between the original lot and the shifting river, it does not follow that where a certain number of acres is carved out of the original tract and conveyed by a specific description, such specific description can be stretched to include many hundred acres of valuable accretion that was in existence at the time of the conveyance of the particular tract and that had been in existence for a great many years before. This is contrary to the decision in the *Jones v. Johnson* case, *supra*.

J. B. Dabney, for appellee.

While there are a few scattered cases holding that only such accretions as have formed after the conveyance belong to the new owner when not specified in the deed, the overwhelming weight of authority is to the contrary.

The leading case is that of *Jeffries v. East Omaha Land Company*, 134 U. S. 178, 33 L. Ed. 872, decided by the supreme court of the United States in 1890. In that case the deed described the land as lot 4 in section 21, of a certain township and range, containing thirty-seven and twenty-four hundredths acres, and it was shown by the Government Survey and plat that this lot was bounded on one side by the Missouri River, and it was held that accretions that had formed along the boundary passed under the above description. *New Orleans v. United States*,

35 U. S. —, 10 Pet. 662, 717; 9 Pet. 573, 594; *Banks v. Ogden*, 69 U. S. —, 2 Wall. 57, 67, 17 Wall. 818, 821; *Jones v. Soulard*, 56 U. S. —, 24 How. 41, 16 How. 604.

"We come now to consider the question of what passed by the description in the patent of the land as lot 4, containing thirty-seven and twenty-four hundredths acres, according to the official plat of the survey of the land, return to the General Land Office by the surveyor general.

"It is a familiar rule of law that, where a plat is referred to in a deed as containing a description of land the courses, distance and other particulars appearing upon the plat are to as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed.

"In *St. Paul & P. R. Co. v. Schrummeier*, 74 U. S. —, 7 Wall. 272, 19 Wall. 74, this court said: 'Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the track, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, from meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line, as actually run on the land, is the boundary.

"We are therefore of opinion that the patent of June 15, 1855, which described the land conveyed as lot 4, according to the official plat of the survey of which a copy is annexed to the bill, marked exhibit A conveyed to the patentee the title to all accretions which had been formed up to that date. *Jones v. Johnson*, 59 U. S. —, 18 How. 150, 15 How. 320;

Lamb v. Rickets, 11 Ohio, 311; *Giraud v. Hughes* 1 Gill & J. 249; *Kraut v. Crawford* 18 Iowa, 549.

"The case of *Jones v. Johnston*, 59 U. S.—, 18 How. 150, 15 How. 320, is cited by the defendant as holding that a grantee can acquire by his deed only the land described in it by metes and bounds, and cannot acquire, by way of appurtenances land outside of such description. But that case holds that a water line, which is a shifting line and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object, such as a street or a wall; and it justifies the view announced by the circuit courts in its opinion, that where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line. See also *Lamb v. Rickets*, 11 Ohio, 311; *Giraud v. Hughes*, 1 Gill. & J. 249; *Kraut v. Crawford*, 18 Iowa, 549."

The Jeffries case has been cited and approved as holding that water line boundary remains such, although shifting in the following cases: Approved in *St. Louis v. Rutz*, 138 U. S. 245, 34 L. Ed. 949, 11 St. Ct. 344, deed carried sand bar and accretion; *Hardin v. Jordan*, 140 U. S. 380, 35 L. Ed. 433, 11 St. Ct. 811, water line the boundary, carrying title to center of lake; *Mitchell v. Smale*, 140 U. S. 414, 35 L. Ed. 445, 11 St. Ct. 822, holding a lake a natural boundary to plaintiff's land, including projecting tongue; *Coburn v. San Mateo County*, 75 Fed. 530, boundary extended to high water mark on shifting beach; *Ever-san v. Waseca*, 44 Minn. 248, 46 N. W. 450, holding title extended to lake beyond meander line; *Denny v. Cotton*, 3 Tex. Civ. App. 643, 22 S. W. 126, shifting line of Rio Grande, held to be boundary; *Poynter v. Chapman*, 8 Utah, 450, 32 Pac. 692, collecting authorities and holding riparian owner entitled to dry land

made by recession of lake; *Knudsen v. Omanson*, 10 Utah, 128, 130, 37 Pac. 250, water line, not meander line, held boundary; *Whitney v. Detroit Lumber Co.*, 78 Wis. 249, 47 N. W. 428, of *Northern, etc. Land Co.*, v. *Bigelow*, 84 Wis. 166, 54 N. W. 499, 21 L. R. A. 741, and holding shore of lake the boundary; *Mendota Club v. Anderson*, 101 Wis. 490, 78 N. W. 189, water line of Mendota lake held actual boundary; dissenting opinion in *Cooley v. Golden*, 117 Mo. 55, 59, 23 S. W. 108, 109, 21 L. R. A. 308, 309, majority holding island formed by change of courses not property of riparian owner; *Smith v. Furbish*, 68 N. H. 127, 44 Atl. 399, generally.

It will be seen from the foregoing quotations in the Jeffries case, that where the land surveyed runs into a navigable stream the water line is the boundary and the meander line is given in the field notes merely to calculate the area of the tract so that the price can be fixed; that this boundary shifts with the water line and that a conveyance of the base land that is silent as to accretions carried with it all accretions, no matter when formed. *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415; *Kennedy v. Municipality No. 2*, 10 La. Ann. 54; *Minto v. Delaney*, 7 Or. 337.

The deed from Smith & Moore to Grant was in general terms and instead of being an attempt to restrict the quantity of land conveyed, clearly sought only to reserve a definite portion of the section lying most remote from the river.

It is true that the deed to Mr. Grant gives the area of one hundred and seventy-five acres, more or less, but this was clearly a mere recital and not an attempt to confine the area conveyed to that figure, as argued by counsel: *Bellefontaine Imp. Co. et al. v. Niedringhams, et al.* (Ill. 1899), 55 N. E. 184.

In view of the foregoing we respectfully submit that no proposition could be more clearly established than that complainant appellee was and is the owner

of these accretions, in which events she is, of course, entitled to the value of the timber cut therefrom.

STEPHENS, J., delivered the opinion of the court.

Our construction of the deed from Smith and Moore to Malcom McN. Grant leads to the conclusion that the learned chancellor erred in rendering a decree in favor of appellee as complainant in the court below. The deed by which she claims conveys a definite, well-defined parcel of land. To designate the area conveyed the draftsman of the deed makes use of compass and chain, and traces the definitely surveyed line. The deed states upon its face that it conveys "one hundred and seventy-five acres more or less." This fact is not controlling, but persuasive. At the time this deed was executed the large body of ground formed by accretions was clearly above the water line, and had been formed so long that valuable merchantable timber stood upon it. The accretions formed a parcel of land much larger than the area conveyed by the deed in question. For purposes of this we must assume that Smith and Moore were the legitimate owners of the three hundred and thirteen and twenty-four hundredth acres, and in conveying their land they had a perfect right to convey only such portion as they wanted to convey. The deed discloses upon its face an intention to convey a definite parcel of land, and not to convey the accretions. The intention of the deed should, of course, govern. If the grantors had conveyed by lot numbers or by governmental subdivisions, the case would be different. The deed to Grant nowhere states that the water line is a boundary, and, according to the definite description, no line run or described in the deed is in fact the water line. The water nowhere touches the one hundred and seventy-five acres particularly described. The case is therefore differentiated from the cases relied

upon by counsel for appellee. It is contended for appellee that appellant's timber deed covers accretions to Carolina Landing Plantation, and does not include the accretions in controversy. But this is not a controversy between appellants and the grantors of the timber rights. Appellee, as complainant, was obliged to show title, or at least actual possession. She stood upon her title but failed to prove it. It is stated in *Jones et al. v. Johnston*, 18 How. (59 U. S.) 150, 15 Law Ed. 320:

"Any past accretions belonged to the then owner, and whoever sets up a title to them must show a deed of the same, as in the case of any other description of land."

The opinion at another point observes that:

"A grantee can acquire by his deed only the lands described in it by metes and bounds, and with sufficient certainty to enable a person of reasonable skill to locate it, and cannot acquire lands outside of the description by way of appurtenance or accession."

The Arkansas court, in the case of *Towell et al. v. Etter et al.*, 69 Ark. 34, 59 S. W. 1096, quotes from Gould on Waters (3d Ed.), par. 186, and then states:

"That is to the effect that a vendee is entitled to accretions to land made after his purchase, but not to those made before, unless the accretions are expressly conveyed" (citing, also, *Jones v. Johnston*, *supra*).

It is said by the Louisiana court in *Barre v. City of New Orleans*, 22 La. Ann. 613:

"If, at the time of the sale of riparian land, the alluvion attached has attained a sufficient elevation above the waters to be susceptible of private ownership, the alluvion does not pass with the land, unless so expressed."

This in no wise conflicts with the rule clearly announced by the supreme court of the United States in other cases that a description by a lot number as designated on the government survey will carry accre-

tions already formed. That is not the case here. It follows that the decree of the court below should be reversed, and a decree entered here in favor of appellants, dismissing the bill.

Reversed, and decree here for appellants.

Reversed.

ANDERSON ET AL., BANK EXAMINER, v. OWEN ET AL.

[73 South. 286, Division B.]

BANKS AND BANKING. *Insolvency. Claims. Guaranteed deposits.*

On the insolvency of a bank the deposits of which are guaranteed under the state banking law (Laws 1914, chapter 124), a depositor has a claim for the full amount of his deposits, undiminished by a check against such deposits for sight exchange, on which sight exchange payment was refused on account of insolvency and liquidation proceedings of the bank, in the absence of proof by the liquidators that the sight exchange was in fact accepted as payment of the checks.

APPEAL from the chancery court of Newton county.
HON. G. C. TANN, Chancellor.

Ancillary petition in liquidation proceedings by W. F. Owen, receiver and another, against E. F. Anderson and others, Bank Examiners. From a decree overruling a demurrer to the petition, the bank examiners appeal.

This controversy grows out of the following state of facts: The Bank of Newton being insolvent, its affairs and estate were taken in charge for liquidation by E. F. Anderson, representing the board of bank examiners, under and by virtue of chapter 124, Laws 1914. The doors of the bank were closed in order that the bank might be liquidated and its affairs wound up in accordance with the provisions of the state banking act.

112 Miss.]

Statement of the case.

A few days before the bank closed and went into the hands of the examiners, W. F. Owen, as receiver of the New Orleans, Mobile & Chicago Railroad Company, one of the appellees herein, having on deposit in the said bank four thousand seven hundred eleven dollars and seventy-seven cents drew a draft on his checking account for one thousand dollars and deposited same with a bank in Mobile, Ala. This draft for one thousand dollars was duly presented, and in exchange therefor the agent of the depositor received the sight exchange of the Bank of Newton on the First National Bank of Meridian, Miss., and this sight exchange was, in due course of business, presented for payment and same was refused, for the reason that the bank was insolvent and in process of liquidation. Likewise, the Atlantic Life Insurance Company, the other appellee herein, had on deposit three thousand and five hundred ninety-two dollars and fifteen cents, and on February 8, 1916, and before the doors of said bank were closed, it drew a check on its account for one thousand and five hundred dollars, and received in lieu thereof sight exchange on the First National Bank of Meridian, which was likewise in due course of business presented and dishonored, for the reason that the property and affairs of the bank were in the hands of liquidators. Thereafter, and in the course of the administration of the estate of said bank, the liquidators, in pursuance of section 36 of the state banking law aforesaid, executed and delivered to appellees certificates for their deposits, but limited the amount of these certificates to the deposits reflected by the books of the bank at the time the examiners took charge. These certificates did not embrace the amounts represented by the sight exchange given appellees upon the First National Bank of Meridian. The liquidators took the position that W. F. Owen, receiver, was depositor for only three thousand and seven hundred eleven dollars and seventy-seven cents, and that the Atlantic Life

Insurance Company was depositor for only two thousand and ninety-three hundred dollars and fifteen cents. They further contended that the indebtedness evidenced by the cashier's checks or sight exchange no longer constituted a deposit but that, as to these items, appellees were simple creditors, without the benefits and security which chapter 124, Laws 1914, accords the deposits. Appellees, on the contrary, contend that they are depositors for the entire amount of their claims and are entitled to have depositors' certificates according them the benefits of the guaranty fund provided by the act. In the course of the administration, appellees presented an ancillary petition to the chancery court having jurisdiction of the estate, asking that the state bank examiners be authorized and directed to treat petitioners in all respects as depositors for the full amount of their respective claims, and to accord to petitioners all the rights and benefits guaranteed to depositors by the statute. That facts in connection with the deposit, and the issuance of the sight exchange on the First National Bank of Meridian, were stated in detail in the petition. A demurrer was interposed to the petition and by the court overruled, and this appeal granted from the decree overruling the demurrer.

Watkins & Watkins, for appellant.

The question squarely presented in this case is as to whether or not the petitioners were and remained depositors for their respective indebtedness, evidence by the cashier's checks, which had been substituted and accepted by them in lieu of their deposits, and with which their respective accounts had been debited, it will be noticed that the act deals with two classes of deposits; see section 38, deposits guaranteed by the act, and deposits which are not guaranteed by the act; and it is provided that guaranteed deposits are deposits which are not secured. If appellees, for the items which

are in dispute, are depositors at all, they, of course, are entitled to participate in the guaranty fund, and are entitled to interest bearing certificates provided in section 38 of the act, the question being, however, as to whether or not they changed their relation of depositors to that of simple creditors by accepting the cashier's checks in question, with which their respective accounts became debited. It is clear that after they were debited with the respective items, their balances were diminished, and after receiving the cashier's checks, the books of the bank being debited with the respective items, showed their diminished balances.

Now, it will be noted that not every claim against a bank is guaranteed; not only not every claim is guaranteed, but not every depositor is guaranteed, but only a restricted and limited class of depositors. We respectfully submit that in using the word "deposits" in section 38 of the act, the word was used in its usual, customary and ordinary sense. It meant unsecured bank balances, subject to check in the usual course of business. This class of depositors and creditors of the bank were guaranteed; others were merely simple creditors.

It is therefore perfectly obvious that a person having a claim against a bank may be a depositor one moment, and then in lieu of the deposit, may accept some obligation evidencing the relation of debtor and creditor by termination of the relation of depositor in the generally accepted sense. Ordinarily, the word deposit or depositor has a fixed meaning. *Commonwealth v. Sponsor*, 16 Pa. C. O. Ct. R. 116-119; *Anheuser-Busch Brewing Co. v. Clayton* (C. C. A.), 56 Fed. 759; *In Re Brandywine Bank*, 1 Chas. Rep. 431-433; *State Savings Bank v. Foster*, (Mich.), 79 N. W. 499, 118 Mich. 268, 42 L. R. A. 404; *Catlin v. Bank*, 7 Conn. 487; *Wright v. Holmes* (Maine), 3 L. R. A. (N. S.) 769; *States v. Corning Savings Bank* (Ia.), 113 N. W. 500, 136 Ia. 79; *Wilkinson County v. Arthur* (S. C.), 74 S.

E. 361, 911 S. C. 163; *Carroll v. Corning Saving Bank* (Ia.),—N. W. 97, 127 Ia. 198; *Pratt v. Union National Bank* (N. J.), 75 A. 313; *Nebraska v. First Nat'l Bank*, 88 Fed. 947; *Hunt v. Hopley*, 95 N. W. 205, 206, 102 Ia. 695, citing *In re Law's Estate*, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103; *State v. McFetredge*, 84 Wis. 473, 54 N. W. 998, 20 L. R. A. 223; *In re Law's Estate*, 22 Atl. 831, 832, 144 Pa. 499, 14 L. R. A. 103; *State v. McFetredge*, 54 N. W. 1, 11, 84 Wis. 473, 20 L. R. A. 223; *Langford, State Bank Commissioner, v. Schroeder*, 147 Pac. 1049, Law Rep. Ann. 1915, F. 623; *Columbia Bank & T. Co. v. United States Fidelity & Guaranty Co.*, 33 Okla., 535, 126 Pac. 556; *Lankford v. Oklahoma Engraving & Printing Company*, 35 Okla. 404, 103 Pac. 278.

We think that these authorities are decisive of the question. The ancillary petition of the appellees is based upon the theory that they were depositors, that they were entitled to interstate bearing certificates provided for in section 38 of the act; that the bank examiner had refused to issue such interest bearing certificates for the items in dispute, and the petition is brought to compel their issuance in order that they may share in the advantages of the bank guaranty fund. It follows from these authorities that the appellees were not depositors, and were not entitled to the advantages of the act in question as guaranteed depositors, the demurrer of the appellants should have been sustained and the petition dismissed.

Flowers, Brown, Chambers & Cooper, for appellee.

The question, therefore, is, did the fact that the Bank of Newton in honoring the checks of appellees by issuing its checks on its account in another bank thereby alter the character of the bank's indebtedness to appellees, changing them from depositors to simple creditors when such checks so issued in payment were not

paid by reason of the bank's own act, or an act beyond the reach of appellees.

The question is necessarily one where little authority in point can be found. The question whether a person is a simple creditor or depositor has never been material in many cases. General principles must, therefore, be controlling. *Nebraska v. First National Bank*, 88 Fed. 947; *Hunt v. Hopley*, 95 N. W. 204, 206, 120 Ia. 695, citing *In re Law's Estate*, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103; *State v. McFetredge*, 84 Wis. 473, 54 N. W. 998, 20 L. R. A. 223; *In re Law's Estate*, 22 Atl. 831, 832, 144 Pa. 499, 14 L. R. A. 103; *Eyrich v. Capital National Bank*, 67 Miss. 60, 6 So. 615; 1 Morse, Banks, sec. 326; 7 Corpus Juris., page 641.

From the authorities cited we get the principle that a depositor of a bank is a creditor of the bank and entitled to be paid the amount of his deposit on demand in money. This duty to pay is that of any debtor. In fact the court will not find the books making any distinction between banks and other debtors.

It was the duty of the Bank of Newton to pay and they did so by check which was dishonored. Is this a payment of the deposit? We submit that it is not. *Citizens Bank v. Kretschmar*, 91 Miss. 608, 44 So. 930; *Taylor v. Conner*, 41 Miss. 722, 97 Am. Dec. 419; *Wadlington v. Covert*, 51 Miss. 631; *Fleigh v. Sleet*, 43 Ohio St. 53, 1 N. E. 24, 54 Am. Rep. 800; *Weddingan v. Boston Elastic Fabric Company*, 100 Mass. 422; *Born v. Bank*, 7 L. R. A. 442.

Counsel say we have no deposit. The *Kretschmar Case*, *supra*, holds that the giving of a worthless check does not keep the debt from being a continuing, subsisting debt from the date the worthless check was given. We think counsel's contentions fall to their own weight.

This conclusion being correct the case must be affirmed.

STEVENS, J., delivered the opinion of the court.

We are of the opinion that the petition of appellees sufficiently states a case for relief. The bill charges that the Bank of Newton had on deposit in the First National Bank of Meridian sufficient funds to pay the sight exchange given appellees. These funds on deposit in Meridian went into the hands of the bank examiners as a part of the assets. The only reason why this paper of the Bank of Newton was dishonored was because the institution had gone into the hands of a receiver and its property was *in custodia legis*. If the bank had not failed, this sight exchange would have been honored. By the bank's failure and the consequent insolvency proceedings, appellees are unable to collect the sight exchange given to them, and it seems clear to us the depositors' checks—that is, the original checks issued by appellees upon their individual accounts—have never, in fact, been paid. The sight exchange held by appellees should either be paid in full or the parties should be placed in the same position they were in before their checks were issued and presented. There is no showing that the sight exchange given appellees was accepted as payment, and the burden of proof would be upon the Bank of Newton, and consequently would here be upon the liquidators, to show that the sight exchange was in fact accepted as payment. The case falls within the principle clearly announced by our court in *Citizens' Bank of Greenville v. Kretschmar*, 91 Miss. 608, 44 So. 930. If either one of the appellees had deposited to his individual account in the Bank of Newton a worthless check drawn by, or a draft drawn upon, a third party, there would be no question but that, under the general rule of good banking, the Bank of Newton would charge back such dishonored check or draft against the account of appellee. We see no reason why the rule should not work both ways. It is the real indebtedness and not the apparent credit upon the books of the bank that

should govern in any controversy between the bank and its depositors. The fact that appellees had on deposit, before the bank failed, the larger sums here contended for is undisputed. No part of these sums has been paid; the state banking law was intended to afford security for these funds. The remedial and salutary effect of the statute should not be restricted or limited by any narrow interpretation. We think the full amount of appellees' claims should be classed and treated as guaranteed deposits. The action of the chancellor in overruling the demurrer is accordingly approved, and the cause remanded for further proceedings.

Affirmed and remanded.

McGEHEE ET AL. v. WEEKS.

[73 South. 287, Division B.]

1. **MORTGAGE.** *Deed as mortgage. Parol evidence. Cancellation of instruments. Suit to cancel deed. Relief. Sequestration.*

The grantors of a deed, on the trial of their suit to cancel the deed on the theory that it was intended to be a mortgage or that they were by a separate instrument accorded the right to repurchase, had the right to show by parol evidence that the deed was intended to operate as a mortgage where they remained in possession after the giving of the deed.

2. **CANCELLATION OF INSTRUMENTS.** *Suit to cancel deed. Suggestion.*

In a suit to cancel a deed absolute in form, on the theory that it was intended as a mortgage, where defendant filed a cross-bill averring that he was the landlord of complainants and that they were indebted to him for rent for a year, and that he believed that they would remove the agricultural products from the leased premises, unless sufficient goods were distrained, it was within the discretion of the chancellor to issue a writ of sequestration to seize sufficient crops to cover the amount of the rent, upon cross-complainants procuring a sufficient bond to indemnify complainant.

APPEAL from the chancery court of Attala county.
HON. A. Y. WOODWARD, Chancellor.

Bill by M. J. McGehee and another against A. W. Weeks, wherein defendant filed a cross-bill and applied for a writ of sequestration. From an interlocutory decree granting the application, complainants appeal.

The facts are fully stated in the opinion of the court.

James F. McCool and Thomas Land, for appellant.

Teat & Teat, for appellee.

STEVENS, J., delivered the opinion of the court.

This appeal is prosecuted from an interlocutory decree granting an application on the part of the defendant and cross-complainant, A. W. Weeks, for a writ of sequestration to seize certain agricultural products grown upon the premises in litigation. Appellants were the complainants in the court below, and by their bill seek to cancel a deed absolute in form executed by them in favor of the defendant. The theory of the bill seems to be that this deed was intended as a mortgage, or at least that appellants by separate instrument of writing were accorded the right to repurchase the lands upon payment of one thousand nine hundred and sixty-five dollars and eighty-four cents on or before November 1, 1914; and in event they did not redeem the land by that date, they, by the same instrument, promise to pay the defendant or order the sum of one hundred twenty five dollars as and for the rent of the premises for the year 1914. The writing by which they promise to pay rent and by which they are given the right to redeem the land appears to have been executed on the same day the deed of conveyance was signed and delivered.

This separate instrument is crudely drawn, but, whether it operates as a deed of defeasance or not, it appears from the pleadings that appellants, as the gran-

tors in the deed, remained in possession, and upon the trial of the case upon its merits they would be permitted to show by parol evidence or otherwise that the deed was intended to operate as a mortgage. Their bill avers that time for paying the amount necessary to redeem was by oral agreement extended by Mr. Weeks. The bill also avers that the consideration for the deed was a previous indebtedness due by appellants to Mr. Weeks, and that there is embraced in this indebtedness usurious interest and other illegal charges. The answer denies the material allegations of the bill, and this answer is made a cross-bill. It is averred in the cross-bill that the defendant and cross-complainant is the landlord of appellants; that appellants are indebted to cross-complainant for the sum of fifteen dollars rent of the premises for the year of 1914; that cross-complainant has just cause to suspect, and does verily believe, that his tenants will remove the agricultural effects from the leased premises unless sufficient goods are seized and distrained, and for the purpose of making sure the rents cross-complainant tenders a bond in the sum of seven hundred dollars and prays for a writ of sequestration and seizure of sufficient agricultural products to realize the full amount of rents claimed. Upon the pleadings, affidavit, and bond thus tendered the chancellor entered an interlocutory decree directing the issuance of the writ of sequestration and a distress warrant as prayed for, and to this action of the court in rendering this decree appellants, as complainants in the court below, excepted, and prayed for and obtained an appeal.

We cannot say that the chancellor erred in the rendition of the decree complained of. No testimony has been taken, and the cause has not yet been tried upon its merits. It was certainly within the power and the sound discretion of the chancellor to issue the writ of sequestration complained of. The cross-complainant tendered and the chancellor required a good and suf-

ficient bond as a condition precedent, and this bond will indemnify appellants for any damages they sustain by reason of any improvident process of the court. If cross-complainant is a landlord, then certainly he ought to be secure in his rents for the year 1914. Appellants, as complainants in the court below, initiated this litigation, and subjected thereby the premises to the jurisdiction of equity. It may be here noted that complainants, on filing their bill obtained an interlocutory decree enjoining the defendant from attempting to collect rents, except in chancery court, and this decree was given without requiring any bond. It was the manifest purpose of the interlocutory decree appealed from to protect both parties to the litigation until the cause could be tried upon its merits. The only error, if any, was in granting any appeal from an interlocutory decree which in fact settled none of the rights of the parties.

Let the decree of the lower court therefore be affirmed, and the cause remanded.

Affirmed and remanded.

WILSON ET AL. v. KUYKENDALL ET AL.

[73 South. 344, Division B.]

1. TRESPASS. *Elements of damages. Taking property without legal process.*

Where appellant went upon the premises of appellee over his protest and without having any writ or warrant of any kind from any officer of the law, took possession of a mule he had sold on a conditional contract and thereby frightened appellee's wife, and putting him to expenses in recovering the property, the jury may consider not only the value of the mule, but all other circumstances in fixing the damage.

112 Miss.]

Brief for appellant.

2. SAME.

Under the law a party has not the right to invade the premises of another and take from the possession of the other party by force against the will of the party in possession any property, even though he may have title thereto. He must in such case resort to the courts to obtain possession, if the party in possession refuses on demand to deliver the property.

APPEAL from the circuit court of Carroll county.

HON. H. H. ROGERS, Judge,

Trespass by W. R. Kuykendall and others against R. C. Wilson and others. From a judgment for plaintiff, defendant appeals.

F. M. Glass, for appellant.

A writ of replevin was sued out by Kuykendall for the mule, which resulted in favor of Wilson. Affidavits were then made out against Wilson's tenants charging them with criminal trespass, but on trial jury verdicts in favor of the defendants were rendered. The court excluded all evidence pertaining to all said cases which was excepted to by appellants.

This action was then brought for trespass committed by Wilson and his tenants in going upon the premises of Kuykendall and taking possession of said mule, punitive damages being asked for by said declaration.

There can be no question about the right of Wilson to retain the title to said mule in his sale to Johnson, and that the title remains in him until full payment of the debt. *Salley v. Young*, 35 So. 571.

The claims of Kuykendall as an innocent purchaser would not defeat Wilson's rights to said title, were in an innocent purchaser. *Salley v. Youny*, 35 So. 571.

However, the evidence discloses that Kuykendall was familiar with the condition of said title at the time he traded for said mule. (See Kuykendall's evidence, page 21 of the record.)

The retention of the title is good against all parties, though made by parol. *Parker v. Payne*, 48 So.

835. And on condition broken, the seller is entitled to recover the property. *Williams v. Williams*, 23 So. 291.

It clearly follows, that, when Johnson failed to forward said note to Wilson, and then traded said mule to his brother-in-law, Kuykendall, with knowledge of the condition of the title in Kuykendall, or without such knowledge, Wilson was entitled to the possession of his property. The only question left open is the manner of acquiring that possession. Of course, one way, and I confess the proper one, to acquire the possession would have been a J. P. and a writ of replevin. However, it appears that Wilson took the easy and quiet method by going to Kuykendall's home and leading home a halter to which was fastened said mule.

Appellants confess that the act, thus mentioned, was one of simple trespass, that Wilson should have gone before a J. P. and made out his affidavit in replevin. However, this trespass is limited to the interest in the property held by Kuykendall, and this interest, according to the evidence before the court, extends only to his limited interest in and to the ground entered by Wilson, for no interest in the mule was in Kuykendall. *Salley v. Young, supra*; *Parker v. Payne, supra*; *Williams v. Williams, supra*.

Kuykendall had no interest in the mule and is, therefore, not entitled to recover for the trespass of the mule, especially where he was in possession by his own wrong, a possession acquired with full knowledge of the true condition of the title which deprived him of every right to acquire a title so long as said conditions remained.

However, under any phase of the case, Kuykendall was entitled to recover only such actual damages as he might have sustained, unless the trespass be characterized by fraud, malice, oppression or wilful wrong. *Black v. Robinson*, 61 Miss. 54.

I respectfully submit that this record fails to disclose any fraud, malice or wilful oppression practiced by Wilson on Kuykendall; on the other hand it shows that the mule belonged to Wilson, that there was no fraud, that Wilson and Kuykendall were on friendly terms and, therefore, no malice; that there was no oppression or wilful wrong, because Wilson quietly took possession of that which belonged to him, and which did not belong to Kuykendall. This being true, then Kuykendall was entitled to recover only such actual damages as he might have sustained. The eighth instruction requested by appellants bore directly upon this proposition and was refused by the court as shown by the record. This was fatal error, and entitles the appellants to a new trial.

However, the court lost sight of this fact, it seems, when he modified instruction number 9 requested by appellants, and caused same to conclude with a paragraph with reference to Kuykendall's consent, which instruction was not used by appellants after it was so modified. This error, too, was fatal.

This is especially true when considered in connection with all the instructions asked by appellees, by which the jury were limited in their finding only by the limit placed by the declaration.

I, therefore, respectfully submit that if Kuykendall was entitled to recover at all, he was limited to such actual damages as he might have sustained, as shown by the evidence, if any, which would not have included any interest in said mule, and on account of the action of the trial court in refusing appellants several instructions, the judgment herein should be reversed and the cause remanded, that the matter may be finally adjudicated according to the law in the case.

J. W. Conger, for appellee.

"It is a trespass to enter the lands of another to take one's own personal property." "What is a

trespass? Every entry upon the lands of another without lawful authority is a trespass, though it only be trodden and whether the land be enclosed or not, and no matter whether any damage be done or not. The gist of the action of trespass is the wrongful entry. Whatever is done after that is but an aggravation of damages. If a man's land be not enclosed the law encircles it with an imaginary line to pass which is to break and enter his close. The mere fact of breaking through this imaginary boundary constitutes a cause of action as being the violation of the right of property." *Agnew v. Jones*, 74 Miss. 347, 23 So. 25.

"It would be a dangerous doctrine to establish in this country that those who deem themselves owners of any property on another's premises may enter it without leave and take it without invoking the process of law." *Agnew v. Jones* (ib); *Perkins v. Hackleman*, 26 Miss. 41.

And it may be well said as stated therein, that "title and possession should be hunted for before 'crushing the wings of the butterfly to get the secret of their tints.'"

"Rights are not to be dealt with in this airy fashion no matter how humble those who assert them. It may be here the extent of the right is small, but whatever it is, it is sacred from spoliation." *Catchet v. Ocean Springs*, 78 Miss. 509, 29 So. 463.

This is an action of trespass for breaking the close of appellees aggravated by things done after the unlawful entry, the appellees having a lawful and undisputed possession and occupancy of the premises as against not only the trespassers but the world, and is not an action as intimated in the brief of appellants, for the determination of the ownership of a mule, or damages for the deprivation of appellees interest therein.

There was a way to determine who owned the mule, and who was entitled to its possession—and there was only one way to do it—and that by law—the same law

by which these appellees asked for the court below, and now this court, humble as they may be, renters though they are relief against a flagrant trespass, a wilful violation of their sacred possession, by way of damages.

"Where wilfulness, fraud, malice or oppression, evincing a disregard for the rights of others, characterize the wrongful act complained of, the jury are not limited in their verdict to the mere value of the property and interest, but may rightfully consider the circumstances of aggravation and increase the damages as to enforce a respect for the rights of others and as a punishment to the wilful trespassers." 51 Miss. 103; 40 Miss. 352; 43 Miss. 569 and 602.

The cases cited by appellants in their brief, with reference to the right of a seller to retain title to personal property sold, and retake it after condition broken, are simple enough and undisputed. But what kind of a title is it? Is it one, granting for sake of argument that Wilson did retain title, that will justify the seller in retaking it by force, breaking one's close in doing it, and against the commands of the occupants, and otherwise disturbing and aggravating one's family? Or, is it one that requires the vendor to make out his affidavit of a lien for the purchase money and have the property taken into possession by the officer and their rights tried in court? Appellants in their own brief answer the question by the remark, "the proper (way to acquire the possession) would have been a J. P. and a writ of replevin." And, the statutes also answer it.

ETHRIDGE, J., delivered the opinion of the court.

The appellees sued the appellants for trespass, and recovered a judgment of one hundred dollars. The appellants appealed from said judgment. The suit originated from the act of the appellants in going upon the

premises of the appellees and taking from the barn of appellees a certain mule over the protest and against the will of the appellees. The appellant Wilson had made a sale of the mule in question to one Johnson, and Johnson had agreed to execute a note for the balance of the purchase money, and the title to the mule was to be reserved in Wilson until payment was made. The note was not delivered at the time that Wilson thought it ought to have been delivered, and he went upon the premises, taking two other parties, appellants, with him and deeming that he had some right to take possession of the mule, took it over the protest and against the consent of the appellees and without having any writ or warrant of any kind from any officer of the law. The mule seems to have been worth about thirty-five dollars, and the appellants contend that this was the measure of damages, if any damages were due. The appellees, however, testify that Mrs. Kuykendall was frightened and disturbed by the conduct of the appellants, and Mr. Kuykendall testifies that he was humiliated and troubled about the matter and put to some expense in trying to recover the mule; the appellants having sold the mule to another party without his consent, and said mule being removed out of the county before the appellee could have a writ of replevin served.

Under the law a party has not the right to invade the premises of another and take from the possession of the other party by force or against the will of the party in possession any property, even though he may have title thereto. He must in such case resort to court to obtain possession if the party in possession refuses on demand to deliver the property. There were no errors in the instructions or in the rulings of the court, and the jury were the judges of the amount of damages, and the judgment is accordingly affirmed.

Affirmed.

YAZOO & M. V. R. Co. v. BOON.

[73 South. 563, Division A.]

APPEAL AND ERROR. *Disposition of cause. Reward on special issue.*

Under Supreme Court Rule 13, so providing when a judgment is reversed and a new trial ordered because the damages are excessive or inadequate and for no other reason the judgment will be set aside only as to damages and be good in all other respects and where a judgment was reversed because of the refusal of the court below to grant an instruction bearing solely on the measure of damages, and the cause then remanded generally, a motion to correct the judgment so as to remand the case for trial only on the question of damages will be sustained.

APPEAL from the circuit court of Bolivar County.

HON. D. W. CUTRER, Special Judge.

Motion to correct judgment in Supreme Court.

Montgomery & Montgomery, for appellant.

Cutrer & Johnson, for appellee.

SMITH, C. J., delivered the opinion of the court.

On a former day of this term, the judgment of the lower court was reversed and the cause remanded generally, because of the refusal of the court below to grant an instruction which had no bearing upon the question of appellant's liability, but solely upon the measure of damages. The cause therefore comes within the provisions of Rule No. 13 (72 So.,—) and, consequently, appellee's motion to correct the judgment formerly rendered by us, so as to remand the cause for trial in respect to damages only, must be and is sustained.

Sustained.

UNITED WOODMAN BENEFIT ASSN. v. IVY.

[73 South. 564, Division A.]

1. INSURANCE. *Mutual benefit insurance. Liability. Appeal and error. Record. Presumption.*

Under a mutual benefit insurance policy, providing for the payment of a sum equal to the total assessments of members who shall meet their assessments and not to exceed one thousand dollars, the liability is *prima-facie* one thousand dollars and in case of a suit on such policy the burden of proof would then rest upon the association, in the event it desired to reduce the amount claimed by the insured under the policy, to allege and prove that the sum collected from its members by the assessment was less than one thousand dollars, since such fact is peculiarly, within the knowledge of the officers of the benefit association.

2. INSURANCE. *Mutual benefit insurance. Liability.*

In a suit on such a policy the declaration for recovery thereon need not allege failure or refusal to make the assessment, or that if the assessment were made the full amount would have been collected.

3. APPEAL AND ERROR. *Record. Presumption.*

In an action on a mutual benefit policy if it was necessary to produce the original policy, on appeal this will be presumed to have been done, where the record by bill of exceptions or otherwise fails to show that the policy was not produced on the trial.

APPEAL from the circuit court of Monroe county.

HON. CLAUDE CLAYTON, Judge.

Suit by Emma Ivy against the United Woodman Benefit Association. From a judgment by default for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Paine & Paine, for appellant.

Under the law in our state it has always been held that a judgment is void upon a claim for unliquidated damages or for a sum not certain or unliquidated or

for an amount contingent upon certain facts to be determined or upon a bond with conditions annexed when the declaration alleges special breaches, unless a writ or inquiry has been awarded and a jury empaneled to assess the damages according to the evidence.

See *Russell v. McDougal*, 3 Smedes & Marshall, 234; *Jenkins v. Wilkerson*, 76 Miss. 368; *Grover v. Gaunt*, 6 Smedes & Marshall, 317; *Boykin v. State*, 50 Miss. 375; *York, Admr., v. Crawford, Admr.*, 42 Miss. 508. We refer the court also to the additional authorities to-wit: Sec. 811, Code of 1906, State of Mississippi; 23 Cyc., page 761; letter c top of page 762; 23 Cyc. page 765, division 7; 23 Cyc., page 760, division 4; 6 Ency., Pleading & Practice, pages 132, division "e" and note "6;" 6 Ency. Pleading & Practice, page 136, division "6." Under these authorities the law seems to be well established that in a suit as the one at bar, when the amount due is uncertain or unliquidated and contingent, that a default judgment is void unless the actual amount due is ascertained by writ of inquiry. Appellee may contend that the fact pleaded constitutes a cause of action and the effect of the default is to establish it definitely; but this is not the rule of law but on the contrary the rule of law is this to-wit:

"That all matters well pleaded and essential to judgment are admitted. But the defendant's default does admit plaintiff's allegations of value or amount. These are to be proven before judgment can be taken; the burden of proof as to the amount for which default shall be taken rests upon the plaintiff."

See 6 Encyc. Pleading & Practice, pages 116-128-129. So we respectfully submit that on this assignment of error the case should be reversed.

As to the second assignment of error we say the failure by appellee to offer the original policy or to account for its loss or destruction is fatal error neces-

sitating a reversal of this cause. In the case of *Vickery, et al. v. Rester*, 4 Howard 293, a default judgment was taken in an action on a promissory note without producing the note, and the court held as follows, quoting from page 294 the opinion of the court:

“The long established practice of our courts is in favor of the principle assumed by the plaintiff in error. Although there is a judgment by default in an action on a note or bond, unless sued on as a lost instrument the courts will not permit a judgment to be taken. The note should be produced and filed not only for the purpose of seeing whether there are credits endorsed but for the sake of propriety and for the benefit of the defendant.”

In the case at bar it affirmatively appears from the record that the original policy was not produced in court and filed. See the certificate of the clerk on page 10 of the record. The reason of the rule requiring the production of the writing before the tribunal is found in 2 Wigmore on “Evidence,” sections 1179 and 1185, to which we refer the court.

We submit in conclusion that the default judgment in this case is void and should not have been given appellee; and that the court also committed error in permitting the default judgment to be taken without the production of the original policy sued on. Either assignment of error is sufficient to cause a reversal. And for which we respectfully submit that the case should be reversed and remanded.

J. A. Sykes, for appellee.

In the case at bar, the certificate of insurance sued upon provides that the insurance company will pay to the beneficiary named in said certificate on the death of the insured, etc. “A sum equal to the total assessment of the members of the U. W. B. A. who

shall meet their assessments, not to exceed one thousand dollars."

When, therefore, appellee, the beneficiary, filed in the court below, the proper declaration on this insurance certificate and properly obtained service on the appellant company, she thereby made out a *prima-facie* case of her right to recover the full face value of her certificate, and the burden of proof was upon the appellant to show that conditions existed which limited her right of recovery to a smaller sum. The certificate entitled her to \$1000—they had made a partial payment of \$50, and she credited this amount in the declaration—if the total assessment of the members who paid this assessment amounted to that much.

The number of members who did in fact pay this assessment was a matter peculiarly with the knowledge of the appellant, and appellee did not even in her declaration in the court below, have to allege that a number of members sufficient to make her benefit \$1000 paid their assessments.

In *Metropolitan Safety Fund Accident Association v. Windower* (Ill.), 27 N. E. 540, the certificate was for fifteen hundred dollars, but provided that: "In case the amount realized from one full assessment of all the certificate holders liable should be insufficient to pay the face value of this certificate when, by reason of death, it shall become a claim, then the beneficiary herein shall accept the result of such assessment . . . as payment in full of all claims against the association under this certificate of membership."

The beneficiary sued to recover the full face value of the policy. The court in its opinion sets out in full one of the propositions of plaintiff's attorneys, which I copy below as follows:

"By the terms of said certificate, if a cause of action has accrued by reason of the death of said member, the plaintiff is entitled to recover the full sum of fifteen hundred dollars mentioned therein unless the de-

fendant has shown by its pleadings and proof that the amount which would be realized by one full assessment on all certificate holders liable would have been insufficient to pay the face value of the certificate; that the proviso quoted in the membership above is a condition subsequent, and that it is incumbent upon the defendant, in order to avail itself of said proviso, to show the existence of the facts upon which it is to become entitled to the benefits thereof; that the burden is therefore on the defendant to prove that the amount realized by one full assessment of all the certificate holders liable would have been insufficient to pay the face value of the certificate, and unless that fact is shown by a preponderance of the evidence, the amount of plaintiff's recovery should be the face value of the certificate and interest."

The court in commenting on the above proposition says this: "We are unable to perceive any substantial error in the proposition thus held to be the law." Further on in its opinion on this proposition the court lays down the law, thus, viz:

"The amount to be recovered is a sum fixed and liquidate by the contract, viz: fifteen hundred dollars subject to reduction by such sums as may have been paid to the member during his lifetime by way of weekly indemnity, and also in case it turns out that one full assessment of all certificate holders liable would fail to realize that full sum, subject to reduction by the amount of the deficiency. It also follows, as a legal proposition that the burden of establishing these reductions is on the defendant. The clauses by virtue of which it becomes entitled to them are manifestly inserted in the certificate for its benefit and protection. The plaintiff by producing the membership certificate in evidence and proving such collateral facts as are sufficient to show that a cause of action has accrued thereon by reason of the death of the member, makes out a *prima-facie* case of the right to recover the full face

value of the certificate, and the burden is on the defendant to show that conditions exist which limit the right to a smaller sum." *Supreme Lodge, Knights Of Pythias Of The World v. Knight* (Ind.), 3 L. R. A. 411; *Peoples Mutual Benefit Society v. McKay*, 141 Ind. 415, 39 N. E. 231; *Lawler v. Murphy*, 85 Conn. 294, 8 L. R. A. 113; *Nerskin And Another v. Northwestern Endowment And Legacy Association of Minnesota*, 30 Minn. 406, 15 N. W. 683; *Woodmen Of The World v. Wright* (Ala.), 60 So. 1006; *Mason Frat. Assoc. v. Riley*, 65 Ark. 261, 45 S. W. 684; *Thornburgh v. Farmers' L. Assn.*, 122, 260, Ia. 98 N. W. 105; *Wood v. Farmers' Assoc.*, 121 Ia. 44, 95 N. W. 226; *Hart v. Nat'l Mas. Acc. Assn.*, 105 Ia. 717, 75 N. W. 508; *Supreme Commandery KG. R. v. Barrett*, 12 Ky. L. Rep.—; *Supreme Commandery etc. v. Everding*, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419; *Frame v. Camp W. O. W.*, 67 Mo. App. 127; *Kehrbaum v. Kegal* 17 Misc. 635, 40 N. Y. Supp. 589; *Cushman v. Family Fund Soc.*, 13 N. U. Sup. 428; *Chaffey v. Equitable & C. Ass'n*, 2 N. Y. Sup. 481; *Merin v. Aid Assoc.*, 147 N. Y. Sup. 440; *Prudential Mut. Aid Soc. v. Cromleigh*, 3 Walk. 332.

The answer is obvious—none—consequently the empanneling of a jury to find the amount due would have been a vain thing—the law never requires the doing of a vain thing. Counsel for appellant in their brief cite in support of their contention on this point: *Russel v. McDougal*,—3 S. & M. 234; *Grover v. Gaunt*, 6 S. & M. 317; *York, Admr. v. Crawford*, 42 Miss. 508; *Boykin v. State*, 50 Miss. 375.

The court will see from an examination of the above authorities that they were suits on bonds—mostly, if not all, on bonds with conditions annexed where special breaches are alleged. I submit these cases are not applicable to the case at bar. Counsel also cites: 23 Cyc. page 761, letter C; 760, Div. 4, 765, Div. 7; 6 Ency. Pleading and Practice, page 132, Div. e and note 6.

These last citations have reference to suits for unliquidated damages, etc., and, I submit, have no bearing on the case at bar, as this is a case for the recovery of a definite sum.

In conclusion on this proposition, I submit that the action of the court in this regard was exactly correct, that he did not err, and that he should be affirmed thereon.

Appellant's second assigment of error is as follows: "The court erred in entering the default judgment without having the original certificate sued on filed in the cause and presented to the court before the judgment was entered."

Appellant in his brief argues this question under the letter "B" which subdivision I have used here for the convenience of the court. I shall deal with this subject, however under two subheads of my own viz: 1st: Assuming that the original certificate was not introduced or filed—under our statute, it was not necessary to do either; the record does not affirmatively, or in any other manner, show that this original certificate was, or was not introduced—hence the presumption of law is, that it was introduced and filed, if such was necessary. *Gule v. Lancaster*, 44 Miss. 416; *Blackwell v. Reid & Co.*, 41 Miss. 103; *Hamer et al. v. Rigby*, 65 Miss. 44; *Insurance Co. v. Holmes*, 75 Miss. 390; *Montgomery v. Hanover Bank*, 79 Miss. 443.

SMITH, C. J., delivered the opinion of the court.

Appellee instituted this suit in the court below to recover of appellant upon an insurance policy by it, which provided for the payment to appellee upon the death of the insured of "a sum equal to the total assessments of the members of the U. W. B. A., who shall meet their assessments for the benefit of said member, and not to exceed the sum of one thousand dollars." At the trial a judgment by default was rendered, awarding

appellee the sum of nine hundred fifty dollars plus interest; she having admitted in her declaration the payment to her of fifty dollars upon the amount due under the policy. The appeal is from this judgment; and the first assignment of error is, that the court erred "in permitting a default judgment to be taken without introducing any evidence at the hearing as to the actual amount due, and without having had a writ of inquiry first issued to determine the amount actually due on said contract. On account of all of which the judgment is void."

It seems to be admitted by counsel for appellant, and all of the authorities which have come under our observation hold, that if the promise in the policy here in question had been to pay appellee the sum of one thousand dollars or so much thereof as may be realized from one assessment of all the members of the U. W. B. A., *prima facie* the amount due would be one thousand dollars and the burden would then rest upon the appellant, in event it desired to reduce the amount claimed by the insured under the policy, to allege and prove that the sum collected from its members by the assessment was less than one thousand dollars. One of the reasons given by the courts for so holding is that the facts relative to the assessment and the sum of money realized therefrom are not known to the beneficiary in the policy, but are peculiarly within the knowledge of the officers of the benefit association. This reason applies with equal force here.

Moreover, such a provision in a policy is identical in effect with the one here in question; the apparent difference between them being caused by reason of the fact that the two are couched in different language. A promise to pay one thousand dollars or so much thereof as may be collected from certain persons, is exactly the same in effect as a promise to pay such sum as may be collected from certain persons not to exceed one thousand dollars. We are of the opinion, therefore, that

the *prima facie* value of the policy in question is one thousand dollars. While there are authorities to the contrary, this view is fully supported by *People's Mutual Benefit Society v. McKay*, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910; *Association v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; *Lawler v. Murphy*, 58 Conn. 294, 20 Atl. 457, L. R. A. 113; *Supreme Council, etc., v. Anderson*, 61 Tex. 296; *Lueders' Ex'r v. Hartford Life Annuities Ins. Co. (C. C.)*, 12 Fed. 465.

As pointed out by counsel for appellant, the declaration "does not allege a failure or refusal to make the assessment, that if such assessment had been duly made it would have resulted in the collection of the full amount called for by the certificate and claimed that sum or damages for such failure or refusal." This allegation was unnessessary, for, as we have pointed out, the *prima-facie* value of the policy is one thousand dollars and if appellant desired to show that the amount due in fact is less, allegation and proof thereof devolved upon it.

The second assignment of error sets forth that the court erred "in permitting a default judgment to be entered for appellee without having the original policy sued on offered in evidence or its loss or destruction accounted for."

A copy of the policy sued on was filed with the declaration, but it does not appear from the record whether or not the original thereof was produced at the trial and filed with the papers in the case. The only case cited in support of this assignment of error is *Vickery v. Rester*, 4 How. 293, wherein it was said that where a judgment by default is rendered in a suit upon a promissory note, under "the long-established practice of our courts, . . . the note should be produced and filed, not only for the purpose of seeing whether there are credits indorsed, but for the sake of propriety, and for the benefit of the defendant."

Leaving out of view any change which may have been made in the rule announced in that case by the enactment of sections 734 and 735 of the Code, as to which we express no opinion, this assignment of error cannot be sustained, for the reason that if we assume that the long-established practice of our courts referred to includes all written instruments sued on, it does not affirmatively appear from the record, by bill of exceptions or otherwise, that the policy was not produced on the trial; consequently, we must assume that it was, conceding for the purpose of the argument that it was necessary for this to have been done. *Vickery v. Rester, supra*, *Biles v. Wolf*, 49 So. 267; *Wanita Mills v. Rollins*, 75 Miss. 253, 22 So. 819.

Affirmed.

SYKES, J., having been of counsel in the court below, took no part in the decision of this case.

STATE v. ELLIS.

[73 South. 565, Division B.]

FORGERY. Indictment. Sufficiency. Statute.

Under Code 1906, section 1187, providing that any one who with intent to defraud, forges or counterfeits any instrument in writing, purporting to be the act of another by which any pecuniary demand shall be or purport to be created, by which any person may be injured in his personal property, shall be guilty of a felony, an indictment charging that defendant falsely and feloniously forged and counterfeited a check as set out in the opinion of the court, was good against demurrer.

APPEAL from the circuit court of Holmes county.

HON. F. E. EVERETT, Judge.

T. Q. Ellis was indicted for forging a check. From judgment of the court sustaining a demurrer to the indictment, defendant appeals.

The facts are fully stated in the opinion of the court.

Ross A. Collins, Attorney-General, for the state.

McBee & Gardner and *Hill & White*, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

The indictment in this case charged:

"That T. Q. Ellis, in said county, on the 14th day of September, A. D. 1915, did falsely and feloniously, make and forge and counterfeit a certain instrument in writing, commonly known as a check of the tenor, following:

" 'West, Miss., 1/13, 1913. No. —.

" 'West Banking & Trust Company:

" 'Pay to my note or order \$137.50, one hundred thirty-seven 50/100 dollar.

" '[Signed] J. J. Browning.

" 'The above note by J. J. & S. J. Browning given in 1912. T. Q. E.'

—the aforesaid note purporting then and there to be a certain note due the West Banking & Trust Company by said Brownings, with the felonious intent to defraud said J. J. Browning."

The second count charges that:

"T. Q. Ellis on the date aforesaid, in said county and within the jurisdiction of court, did falsely and feloniously make, forge, and counterfeit a certain instrument in writing in the form of a check of the tenor, following:

" 'West, Miss., Jany. 14, 1913. No. —.

" 'West Banking & Trust Company:

“ ‘Pay to note due bank or order \$137.50, one hundred thirty-seven 50/100 dollars.

“ ‘Chy J. J. Browning’
—the note aforesaid purporting to be a certain note due by said J. J. Browning to said West Banking & Trust Company which said note was then and there paid said West Banking & Trust Company as the said Ellis then and there well knew, with the felonious intent to injure and defraud said J. J. Browning.”

This indictment was demurred to, and demurrer sustained by the court, and the state appeals.

Section 1187, Code 1906, reads as follows:

“Every person who, with the intent to injure or defraud, shall falsely make, alter, forge, or counterfeit any instrument or writing being or purporting to be any process issued by any competent court, magistrate, or officer, or being or purporting to be any pleading or proceeding filed or entered in any court of law or equity, or being or purporting to be any certificate, order, or allowance by any competent court, board, or officer, or being, or purporting to be any license or authority authorized by any statute, or any instrument or writing being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be created, increased, discharged, or diminished, or by which any right or property whatever shall be or purport to be transferred, conveyed, discharged, diminished, or in any manner affected, by which false making, forging, altering, or counterfeiting any person may be affected, bound, or in any way injured in his person or property, shall be guilty of forgery.”

We think the instruments uttered come within the provisions of the foregoing statute, and that the instrument alleged to be forged purported to be the act of J. J. Browning. The letters “T. Q. E.” do not purport on the face of the instrument to mean that J. J. Browning authorized some one else to sign his name. These

Brief for appellant.

[112 Miss.]

letters might be applied with equal propriety to the part purporting to be a memorandum, and they do not on their face carry any fixed meaning. Therefore the principles of the case of *People v. Bendit*, 111 Cal. 274, 43 Pac. 901, 31 L. R. A. 831, 52 Am. St. Rep. 186, do not apply to this case. We think the demurrer was improperly sustained, and the case is therefore reversed and remanded for further proceedings.

Reversed and remanded.

LIFE & CASUALTY INS. CO. OF TENNESSEE v. JONES.

[73 South. 566, Division A.]

INSURANCE. Accident insurance. Construction. "Work of any kind."

Under an accident policy providing for weekly payments so long as insured was unable to do "work of any kind," the liability of the company only continues until plaintiff is able to do some work, either light or heavy for which he was fitted by nature, experience or training and the burden is upon him to show that he was unable to do any work at all of which he was capable.

APPEAL from the circuit court of Lauderdale county.

HON. W. W. VENABLE, Judge.

Suit by Wylie Jones against the Life & Casualty Insurance Company of Tennessee. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

S. M. Graham, for appellant.

Some of the cases on similar contracts to this holding that the insured cannot recover if he is able and qualified to work in other occupations are the cases of, *Lyon v. Railway Pass Assur. Co.*, 46 Iowa, 631; *Albert v. Order Chosen Friends*, 34 Fed. 720; *Baltimore & Ohio Relief Ass'n. v. Post*, 122 Pa. 597, 2 L. R. A. 44.

We are aware that there are a great many cases involving the construction of insurance contracts where a different rule is laid down but from an examination of these cases, it will appear that they involved "special occupation policies" or policies fixing a different degree of disability or a disability from following the occupation engaged in at the time of the contract but we find no cases construing the exact contract herein sued on.

Fewell & Cameron, for appellee.

We contend and our contention was sustained by the lower court, that by the use of the term in clause 3, "work of any kind" was meant to refer to the usual and ordinary work which the insured was engaged in at the time of his injury and that the courts do not require an experienced man to qualify himself for work of another character before he is entitled to recover benefits under an accident policy and in this connection we call the court's attention to the following cases: *Turner v. Fidelity & Casualty Company*, 38 L. R. A. 529, and the note thereto; also the case of *Gordon v. United States Casualty Company*, 54 S. W. 98; also the case of *Beach v. Supreme Tent, K. M.*, 69 Northeastern 281; and also particularly to the case of *Mutual Benefit Association v. Nancarfier*, 71 Pac. 426.

In the case of *Wall v. Continental Casualty Company*, reported in 86 Southwestern, page 491, we find the court, in construing the policy, the provisions, which are quiet similar to clause three this policy, using the following language: "So, where the accident policy provides for payment in case insured is wholly disabled from doing any work, or any part thereof, from the date of the accident, the breakman is not precluded from recovery by the fact that he made two runs after the accident, but was obliged to employ a substitute on each, or for the fact that he had trivial work on his farm, which was shown to be work which he

would have done had he been following his usual occupation.

It is admitted by appellant, both in the agreed statement of facts and in their brief filed in this case, that the appellee was wholly unable after he received his injury to attend to his regular occupation and that he was unable to earn a living by the performance of his usual and ordinary duties as train porter.

We submit that this is the test in this case and the fact that his physician certified that he was able to do light work should not and does not bar the appellee from the recovery under this policy.

We also call the court's attention to the case of *Commercial Travellers Mutual Accident Association v. Springsteen*, 55 N. E. 973; also the case of *Fogelson v. Modern Brotherhood*, reported in 97 S. W. 240; and also the case of *Fay v. Standard Life and Accident Insurance Company*, reported in 44 Atl. 184, the court speaking of the proposition of permanent disability of work of any kind, says: "As long as one is in full possession of his mental faculties, he is capable of transacting some parts of his business, whatever it may be, although he is incapable of physical action." If the words, "wholly disabled him from transacting any and every kind of business pertaining to the occupation in which he is engaged" were construed literally, the defendants would be liable in no case unless, by the accident, the insured should lose his life or his reason. It is certain that neither party contended for such a result. It cannot be stated as a matter of law, that the plaintiff's disability was not sufficient to entitle him to compensation under the terms of the policy."

In the case of *C. B. & Q. Railroad Co. v. Olson*, reported in 97 N. W. 831, and the denial of rehearing of said case, reported in 99 N. W. 847, the supreme court in Nebraska in dealing with this question and the report of the physician says: "and where the regulations of the benefit association provided that the word

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Opinion of the court.

"disability" should be held to mean physical inability to work, the decision of the medical examiner that the carpenter who has suffered the amputation of a leg by reason of his injury is "able to work" will not be construed to mean that he has recovered from his disability, while the evidence shows, that at the same time, the examiner declared the injured able to do light work but still disabled."

SMITH, C. J., delivered the opinion of the court.

This is an action instituted by appellee in the court of a justice of the peace to recover of appellant a balance alleged to be due him upon a health and accident policy issued to him by appellant. The cause was tried by the judge below without a jury, on an agreed statement of facts, and judgment was rendered for appellee.

The policy provides for a weekly allowance of seven dollars in case of an accident to appellee, and that "accident benefits will only be paid when the injury is of such a nature as to disable the insured from work of any kind for seven consecutive days," etc. It contains no reference to the occupation of the insured. It appears from the agreed statement of facts:

That appellee "was injured while he was engaged as a train porter, and that the company paid him seven dollars per week from 2d day of March, 1914, to the 28th day of September, 1914, at which date the defendant refused to pay the plaintiff any further sum for said injury, and their reason was that the plaintiff was not disabled from said injury from the performance of work of any kind.

"That the plaintiff was not able at the time further payment refused for the performance of the duties as a train porter.

"That the plaintiff had been serving as a train porter for thirty or forty years, and was getting old and less supple at the time of his injury than he had been in former years.

"That the plaintiff was able to do light work, and had applied to the railroad company, his employer, for light work, and also applied to the defendant for work at the time payment was refused, and plaintiff's physicians so certified in his certificate to plaintiff's proof, that the plaintiff was able to do light work.

"That the amount already paid plaintiff for said injury is two hundred and three dollars; that the amount due plaintiff, if anything, is the sum of eighty-four dollars."

We do not think that the words "work of any kind" contained in the clause of the policy hereinbefore set out can be limited "to the usual and ordinary work which insured was engaged in at the time of his injury" as contended by counsel for appellee, but we will assume for the sake of the argument what seems to be admitted by counsel for appellant, that this language may be limited by a construction to work of any kind for which the insured was fitted by nature, experience, or training. Nevertheless the judgment of the court below must be reversed; for it appears that appellee was able to do and had applied for work, and it does not appear that this work was not of the character that he was fitted by nature, experience, and training to do. In order for him to recover it must appear that he was disabled from doing work of the character contemplated by the policy, the burden of proving which was upon him. That he could do light work only is immaterial for the question, even under this limitation upon the words of the policy, is whether he was able to do work, either light or heavy, for which he was fitted by nature, experience, or training. Whether he is unable to work, within the meaning of the policy, when he can do a portion, but not all, of some particular character of work for which he is fitted, is not presented to us for decision by this record.

Reversed, and judgment here for appellant.

Reversed.

ARMSTRONG ET AL. v. MOORE.

[73 South. 566, Division B.]

APPEAL AND ERROR. Orders appealable. Interlocutory orders.

The right to appeal in any case to the supreme court is regulated and defined by statute and where the court sustained a demurrer to the bill on the ground that it was not sufficient and granted sixty days to amend, an appeal taken to settle the principles of the case will be dismissed in the supreme court, since such decree does not require the payment of money; does not change the possession of property and an appeal therefrom does not settle the principle of the case nor does the prosecution of such appeal avoid expenses and delay but on the contrary, adds to the expenses, and is entertained, will greatly delay the final adjudication on the merits.

APPEAL from the chancery court of Attala county.

HON. A. Y. WOODWARD, Chancellor.

Bill by J. A. Armstrong and others against H. A. Moore. From a decree sustaining a demurrer and granting sixty days to amend, complainant appeals.

On motion to dismiss appeal.

The facts are fully stated in the opinion of the court.

T. P. Guyton, for the motion.

STEVENS, J., delivered the opinion of the court.

Appellants, as complainants in the court below, exhibited their bill of complaint against appellee in the chancery court of Attala county. Their bill was met by demurrer, which, upon consideration, was by the chancellor sustained. The court in sustaining the demurrer granted the complainants sixty days in which to amend the bill. The order of court is as follows:

"Came on this day to be heard the above-styled cause of *J. A. Armstrong et al. v. H. A. Moore et al.*, on

original bill filed and demurrer thereto, and the court after hearing said demurrer to said bill, hereby sustains the same, and at the request of the complainant sixty days is allowed in which to amend said bill."

The next day appellants presented to the chancellor a document in the nature of a special bill of exceptions, and in this writing they petition for an appeal "to settle the principles of the law in the case." The court on that day entered the following order:

"This day came on to be heard the petition of J. A. Armstrong and H. D. Armstrong, complainants in the above-styled cause, praying an appeal to the supreme court, from a judgment rendered on demurrer filed by the defendant to complainant's bill in this cause, and the court having read the bill or petition praying said appeal together with the bill of exceptions tendered in said cause by said complainants has this the 10th day of August, 1916, granted the prayer of complainants' petition for an appeal in said cause from said judgment."

Appellee now presents a motion to dismiss the appeal, because the decree appealed from is not a final decree, and because the appeal in this case is prosecuted without authority of law.

The right to appeal any case to the supreme court is regulated and defined by statute. The appeal in this case should be dismissed. The motion is ruled by the decision of our court in *Clay County v. Chickasaw County*, 63 Miss. 289, and *Barrier v. Kelly*, 81 Miss. 166, 32 So. 999. The decree appealed from does not require the payment of money; does not change the possession of property; and does not settle the principles of the case. The prosecution of this appeal would not avoid expense and delay, but, on the contrary, adds to the expense, and, if entertained, will greatly delay the final adjudication on the merits. When the court sustained the demurrer to the bill, appellants could have declined to amend, and thereupon a final decree would

have been entered by the chancellor, dismissing the bill. Instead of declining to amend, they asked leave of the court to amend, and to have sixty days in which the amendment could be made. This left the cause pending in the court below. All the court decided was, that appellants had not filed a good bill. The amendment allowed may confront the court with a bill of complaint entirely sufficient. It is elementary that this court should not entertain an appeal that is not authorized by statute, and should see to it that the prosecution of an unauthorized appeal does not delay the final hearing of a case upon its merits.

Appeal dismissed.

FEDERAL CHEMICAL CO. v. JENNINGS.

[73 South. 567, Division B.]

EVIDENCE. Writings. *Writings beyond jurisdiction of court. Admissibility.*

Secondary evidence of the contents of a letter will not be admitted for the defendant upon a mere showing that the letter was in another state in defendant's desk at his office, without proof that it was lost, destroyed, or misplaced, or that it could not be found after diligent search.

APPEAL from the circuit court of Lawrence county.
HON. A. E. WEATHERSBY, Judge.

Suit by the Federal Chemical Company against T. H. Jennings. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Luther E. Grice, for appellant.

The mere fact that documents are outside the state does not warrant the admission of secondary evidence.

Floyd v. Mintry, 5 Rich. L. (S. C.) 361; *Waite v. High*, 96 Ia. 742; *Wood v. Cullen*, 15 Minn. 394; *Deaver v. Rice*, 2 Ired. (N. C.) 280; *McGregor v. Montgomery*, 4 Pa. St. 237; *Shaw v. Mason*, 10 Kansas, 184; *Forest v. Forest*, 6 Duer, 104; *Justice v. Luther*, 94 N. C. 793; *Pringley v. Gass*, 16 Okl. 82, 86 Pac. 292.

This is especially true where the documents in question are in the possession of the party seeking to introduce the secondary evidence (as in the case at bar). *Mandel v. Swan Land & Co.*, 154 Ill. 177; *Alabama G. S. R. Co. v. Mt. Vernon Co.* (Ala.), 4 So. 356.

In the case at bar the witness had not made even the most casual effort to obtain and produce at the trial the supposed letter which he was allowed to testify about. To admit such testimony under such circumstances would destroy the doctrine that the best evidence of which the case in its nature is susceptible must be produced.

COOK, P. J., delivered the opinion of the court.

This is a suit on an open account. Appellee, in this case, entered into a written contract with appellant to act as its agent at Hebberville, Ky. By the terms of this contract appellant shipped to appellee, upon his order, three tons of fertilizer. The contract provided that appellee was to sell this fertilizer to the farmers of his vicinity, and when sold on time he agreed to take the purchaser's notes and indorse the same to the appellant. The contract provides for reports, discounts, etc. The record shows that appellee sold some of the fertilizer and made report of his sales. The record further shows that appellee, before he sold the balance of the fertilizer, had a fire, and therefore wanted to cancel his contracts, and deliver the fertilizer on hand to appellant, or some substituted agent of appellant. There is evidence that some correspondence was had on this subject.

There is no possible doubt that appellant should have recovered judgment in this case but for the incompetent testimony which the court, over the objections of appellant, permitted to go to the jury.

Appellee, defendant below, contended that he had been released by appellant. He testified that this release was made by letter; that the letter was in his desk in Kentucky. Appellant objected to this testimony for obvious reasons. The court, however, overruled this objection, stating, "I could not by any manner or means control a paper that is in Kentucky." It seemed to have been the court's opinion that oral evidence of the contents of a writing could be given, when it appeared that the writing was without the territorial jurisdiction of the trial court. It will be observed that there was no effort to prove that the letter was lost, destroyed, or misplaced, and, if lost or mislaid, there was no effort made to show that it could not be found after a diligent search, but, on the contrary, the location of the letter was fixed. Later on the objection was renewed and again overruled, the judge remarking, "It is out of the jurisdiction of the court." So far as our investigations lead, this ruling of the trial judge was unique and announces a brand new rule of evidence. We find ourselves unable to go with the judge, and must decline to indorse his reasoning.

Reversed and remanded.

WRIGHT v. BOWERS ET AL.

[73 South. 568, Division B.]

PARTITION. Right to maintain. Possession of legal title.

An instrument of writing signed by an heir under a will which combines a contract for professional service, a power of attorney and security for a fee, but fails to convey any legal title to property, is not a sufficient basis for an action for partition by the attorney to whom such instrument was given against such heir.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Petition by R. T. Wright against Mrs. Cornelia Bowers and others. From a decree sustaining a demurrer to the bill, complainant appeals.

Appellant exhibited his bill of complaint in the chancery court of Hinds county against Mrs. Cornelia Bowers and other heirs of E. H. Green, deceased, asking for a partition of certain real estate. A demurrer to the bill was sustained, and from the decree sustaining the demurrer appellant prosecutes this appeal. The right to a partition is based upon an instrument in writing which we here set out in full:

“Know all men by these presents: That I, Nena Bowers, formerly Nena Green, and joined by her husband, Lloyd Bowers, both of Chattanooga, Hamilton county, Tennessee, have this day made, constituted, and appointed, and by these presents do make, constitute, and appoint, R. T. Wright, of Chattanooga, Tennessee, our true and lawful attorney, for ourselves and in our name, place, and stead, for the following purposes:

“Whereas, E. H. Green, the father of Mrs. Nena Bowers, party of this contract, died in the year 1903 at Jackson, Mississippi, being the owner at the time of his death of certain real estate situated in Hinds and Madison counties, Mississippi, and known as Green’s

Crossing place, together with certain stock, implements, and tools thereon; also leaving and owning at the time of his death certain real estate situated in Concordia parish, Louisiana, known as 'Haphazard Plantation'; and also leaving as a part of his estate certain moneys, insurance policies, and crops growing on said lands, etc. And at the time of the death of E. H. Green, or before the death of E. H. Green, he made a will setting forth how his property should be divided between his heirs, and giving full instructions as to the winding up of the above-mentioned estate owned by him at the time of his death. He, E. H. Green, also owned at the time of his death a certain house and lot known as his residence place, in Jackson, Mississippi, which was also mentioned in his said will, and it was also directed how same should be kept and administered upon.

"And I, Nena Bowers, being one of the heirs of said E. H. Green, and owning an interest in the above-mentioned property owned by the said E. H. Green, at the time of his death, make this power of attorney to R. T. Wright, and give him full power and authority to do and perform every act and thing whatsoever requisite and necessary to do in or about my interests in said estate of E. H. Green. The said R. T. Wright is given full power and authority to sell or dispose of my interest in any of the estate of said E. H. Green. He is fully authorized and empowered to deed my interest, and to receive a cash consideration for the same. He is fully empowered to negotiate a sale, either for cash or on credit; Provided, if sold on credit, notes are secured with good security. He is further empowered to investigate fully for me as to all acts of the administrators, administratrix, or trustees of said estate; and, should he believe it to my interest to institute any suit for recovery of any property or money of said estate that has been wasted by either the administrators or trustees, he is fully empowered and authorized to do

so.

Statement of the case.[112 Miss.]

"And we, Nena Bowers and Lloyd Bowers, agree to ratify and confirm all acts that the said attorney, R. T. Wright, shall do for me in reference to the above mentioned property.

"In consideration of R. T. Wright's acting as my said attorney in the estate above mentioned, it is understood and agreed by and between us that whatever money he may derive from the sale of said estate, or from any suit he may institute for recovery of any money as above mentioned, or whatever sum may be derived from the sale of said estate, said sale being either made by said attorney, R. T. Wright, or by myself, the said R. T. Wright shall be entitled to one-third ($\frac{1}{3}$) thereof; and to secure the said R. T. Wright, we hereby transfer to him a one-third ($\frac{1}{3}$) interest in the estate above mentioned, it being understood and agreed by and between myself and my said attorney that if he will use his best endeavors to protect my interest in the above-mentioned estate, and take any action he deems necessary for my protection, and watch after and guard my estate, he shall have as his fee for said services one-third ($\frac{1}{3}$) thereof.

"In witness whereof, we have hereunto set our hands and seals on this the 25th day of June, 1906.

Nena Bowers,

"Lloyd Bowers."

This document was made Exhibit B to the bill for partition. The theory of the bill is that the complainant owned in fee simple an undivided interest in the property sought to be partited. From the pleadings and exhibits it appears that E. H. Green, a former citizen of Jackson, Miss., died seised and possessed of certain farm lands situated in Hinds and Madison counties, certain lands in Louisiana, a mansion house in the city of Jackson, and also certain personal property, consisting of bank stock, farming implements, live stock, crops, and life insurance policies. He left a last will and testa-

ment, whereby his estate was devised to his wife and ten children, among whom is Mrs. Cornelia Bowers. Mr. and Mrs. Bowers, at the time the contract made Exhibit B to the bill was entered into, resided in Chattanooga, Tenn., and being dissatisfied with the manner in which the estate was being handled and wound up, they employed R. T. Wright, the appellant herein, as their attorney, and executed and delivered to him this writing, upon which his equity in this suit is based. After the execution and delivery of this instrument, the farm lands in Mississippi were, by a decree in chancery, partited amongst the heirs, and the interest of Mrs. Bowers was set apart to her. Mr. Wright was not a party to this first partition proceeding. After the undivided interest of Mrs. Bowers in the farm lands was set apart to her, Mr. Wright filed this suit against Mrs. Bowers and the other heirs at law of E. H. Green, deceased, setting out the facts above outlined, the partition proceedings by which the separate interests of Mrs. Bowers were set apart to her, particularly described the lands set apart to Mrs. Bowers, and charged that complainant was the owner of a one-third interest in the lands so set apart as the separate property of Mrs. Bowers, as well as the owner of a one-third interest in the property situated in the city of Jackson, upon which Mr. Green resided in his lifetime, and which had not been partited.

The demurrer challenges the right of complainant to maintain any bill for partition. The grounds of the demurrer, briefly stated, are: That the complainant had not performed his agreement; that the contract sued on does not convey the legal title upon which a bill for partition can be predicated; that the bill does not show that complainant recovered any property for the defendant; and that the instrument sued on is a mortgage.

Eugene Palmer, for appellant.

Alexander & Alexander, for appellee.

STEVENS, J., delivered the opinion of the court.

The demurrer to the bill in this case was properly sustained. In construing the instrument under which appellant claims title, we must look to the instrument as a whole, the entire language employed, the relation of the parties one to the other, and the objects sought to be accomplished. As we see and construe it, the instrument under review combines a contract for professional services, a power of attorney, and security for any fee or compensation to which Mr. Wright may be entitled. The full extent of appellant's rights under this contract cannot be adjudicated in this suit, and need not here be fully indicated. The bill is solely one for partition, to maintain which appellant, as complainant in the court below, must show title. The exhibit upon which he relies is not a deed conveying to him an absolute interest in the title. If the bill had alleged a definite indebtedness by Mrs. Bowers to appellant, and sought a personal decree for such amount, and a foreclosure of security therefor, relief might have been granted. There is no alternative relief of this kind sought. If the bill had been taken as confessed, no such relief could have been awarded by the court. In affirming the case, therefore, we do so without prejudice to the right of appellant to recover any indebtedness which Mrs. Bowers may be due him under the contract in question, and without prejudice to his right to impress any lien which this contract may give him upon the land involved in this suit.

Affirmed.

112 Miss.]

Brief for appellant.

OLIVER v. FERGUSON & ALLEN.

[73 South. 569, Division A.]

ATTACHMENT. *Subjection of property to creditors. Possession. Traders. Boarding house keeper.*

A woman keeping a restaurant and boarding house does not belong to the genus "trader" and hence Code 1906, section 4784, relating to the liability of persons transacting business as "traders" has no application to her business.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Attachment for rent by Ferguson & Allen, landlords against M. E. Ates, wherein P. Oliver filed a claimants appeal.

The facts are fully stated in the opinion of the court.

W. S. Pierce, for appellant.

Appellees relied upon section 4784 of the Code of 1906 and claimed that the property of appellant is liable thereunder. I submit that Mrs. Ates, the tenant, was not a trader within the meaning of that section and that she did not acquire the property in question in the conduct of said business. *Durham et al. v. Slidell Liquor Co.*, 49 So. 739.

A trader is one who sells goods substantially in the form in which they are bought and who has not converted them into another form of property by skill and labor; therefore, one who carried on the business and converting it into lumber for sale is a manufacturer, and not liable to indictment for failure to pay a tax and obtain a license as a trader. *State v. Chadbourn*, 30 Am. Rep. 904.

A restaurant keeper is not a trader within the meaning of the statute. *In Re Wentworth Lunch Company*, 159 Fed. Rep. 413; *In Re Excelsior Cafe Co.*, 175 Fed. Rep. 294.

Tally & Mayson, for appellee.

The property being bought, used and acquired in the business and being in the possession of the lessee at the time of its seizure for rent, it was liable for appellee's debt. Code 1906, sec. 478.

Appellant insists that a restaurant keeper does not come within the terms of the statute, because forsooth, the restaurateur is not a trader within the meaning of the statute. Learned counsel place too narrow a construction on the statute. The statute not only provides that for a person transacting business as a trader, but also includes persons of all like kind. The language is "if a person transacts business as a trader or otherwise."

There can be no dispute that Mrs. Ates was transacting business as a hotel keeper and according to the English authorities she is a trader in the strict sense of the term. 38 Cyc. 97, citing *King v. Simmons*, 1 H. L. Cas. 754, 773, 12 Jur. 903, 9 Eng. Reprint 959.

Appellees had a right to subject all the property except the piano and stock, without the aid of the statute. The appellant himself stated that he sold Mrs. Ates this property. On page 18 of the record appellant testified that all the property was in there when Mrs. Ates took charge of the premises. On record 19 we have the following: "Q. Are you claiming the ice box or not? A. Well, I would like to have it; she has not finished paying for it. Q. Is it yours; that is the question? A. No, sir, it is Mrs. Ates; she purchased it of me but she did not finish paying for it." It will be seen then that this property was sold on credit; that the title was in Mrs. Ates and was subject to the landlord's lien without reference to the statute. We insist though that the statute fixes the absolute ownership of all the property claimed by the appellant in Mrs. Ates. The piano and stool is in the restaurant and is being constantly used.

by Mrs. Ates in the business; that fixes ownership in her and its liability to appellee's debt is undoubted.

SYKES, J., delivered the opinion of the court.

Appellees, as landlords, sued out an attachment for rent against one M. E. Ates in a justice of the peace court of Forest county, and certain personal property was distrained under said proceedings as belonging to the tenant, Mrs. Ates. The appellant, Oliver, filed a claimant's affidavit in said case claiming one piano, one stool, some shelving, one counter, one end of a counter, and one ice box as belonging to him. On the trial of the claimant's issue in the justice of the peace court Oliver lost, and presecuted an appeal to the circuit court. In the circuit court Oliver's testimony shows that all of the above-named personal property, with the exception of the ice box, belonged to him and was by him lent to Mrs. Ates, who kept a restaurant and boarding house. The testimony showed that the ice box had been sold by Oliver to Mrs. Ates. At the conclusion of the testimony introduced by the claimant, Oliver, the circuit court granted a peremptory instruction in favor of the landlords (appellees here) upon the theory that section 4784 of the Code of 1906 was applicable, that under this section of the Code Mrs. Ates transacted business as a trader or otherwise, and that the above-named property was used or acquired in such business by her. Mrs. Ates, whether she was a hotel proprietor or a restaurant and boarding house keeper, did not belong to the class of persons included in this section, and the personal property above mentioned was not used or acquired by her in any such business. As was stated by Woods, C. J., in the case of *Van Range Co. v. Allen*, 7 So. 499:

"The hotel keeper not belonging to the genus trader, . . . we are wholly unable to see what applicability

that statutory panacea, section 1300 of the Revised Code, had to the case at bar."

Section 4784 is an exact copy of section 1300 of the Code of 1880. The lower court was correct in the peremptory instruction relating to the ice box, but committed error as to the other items of personal property above set out.

Reversed and remanded.

STEVENS v. D. R. DUNLAP MERCANTILE Co.

[73 South. 570, Division A.]

1. EXECUTORS AND ADMINISTRATORS. *Settlement of estate. Approval of claims by clerk. Statute.*

The requirement under Code 1906, section 2106, that the clerk if he approves, shall endorse on a claim against the estate of a decedent the words "probated and allowed for \$—— and registered this —— day of ——" is mandatory and in the absence of such endorsement the claim is lifeless, but the court if of the opinion that the clerk actually intended to approve and allow the claim had, the power within one year before the claim was barred by the statute of limitations under section 2106 of the Code of 1906, to enter an order, authorizing the clerk to approve and allow the claim under the statute, when however the one year statute of limitations has run, the court and the clerk are both absolutely powerless to breathe the breath of life into the claim.

2. SAME.

The only competent evidence of the probate and allowance of a claim against the estate of a decedent, is the written indorsement of the clerk.

APPEAL from the chancery court of George county.
HON. W. M. DENNY, Chancellor.

Petition by J. C. Stevens, administrator of J. B. Stevens, deceased, against D. R. Dunlap Mercantile

Company. From a decree ordering the clerk of the chancery court to indorse defendant's claim against the estate as required by law as of the time it was originally filed for probate, the administrator appeals.

The facts are fully stated in the opinion of the court.

Stevens & Cook and *O. F. Moss*, for appellant.

Mayes, Wells, May & Sanders and *White & Ford*, for appellee.

SYKES, J., delivered the opinion of the court.

This is the second appeal of this case to this court from a decree of the chancery court of George county. The appellee mercantile company filed its claim for probate against the estate of J. B. Stevens, deceased, with the chancery clerk of George county within the time allowed by the law. The appellant administrator filed his petition, averring that the claim of appellee against the said estate had not been probated in the manner required by law, and that the presentation of the claim to the administrator was not sufficient in law to authorize him to pay it out of the funds of the estate. He, therefore, prayed that the claim be disallowed. The chancellor sustained a demurrer of the appellee to this petition, and dismissed it. An appeal was then prosecuted to this court, and the decree was reversed, and the cause remanded. The objection, in the first appeal which relates to this appeal, was that the clerk of the chancery court failed to follow the provisions of section 2106 of the Code of 1906, the said provision reading as follows:

"Thereupon, if the clerk shall approve, he shall indorse upon the claim the words following: 'Probated and allowed for &—, and registered this — day of—, A. D. —,' and shall sign his name officially thereto. Probate, registration, and allowance shall be sufficient

presentation of the claim to the executor or administrator."

From the report of this case in 67 So. 160, it appears that the clerk actually registered this claim in his registry claim book, but failed to make the proper notation, as above set forth on the claim. The decision of the court on that appeal holds that:

"Such probate, allowance, and registration is an official act of the clerk, and it is shown by his indorsement upon the claim itself; such indorsement being the mandatory requirement of the statute. The entry of the claim in the record of registration of claims will not avail to render it unnecessary for the clerk to approve the claim and enter his indorsement thereon, as required by law."

Upon the remand of the case to the chancery court the appellee here, defendant in that court, filed an answer and cross-petition to the petition of the appellant, alleging, in substance, the following: It denies that the clerk did not approve the account; admits the clerk did not, at the time the claim was presented to him for probate, indorse thereon, "Probated and allowed for \$—, and registered this — day of —, A. D. 19—;" admits that he did not sign his name officially to said indorsement; but avers that the reason the clerk did not do so in the statutory form above provided was because of the fact that he but lately qualified as clerk, and was not informed as to his duties, and inadvertently neglected to indorse the claim as above set out; avers the fact to be that the claim was presented to the clerk for probate and registration in proper form and within the time allowed by law; that upon receipt of the same the clerk filed and entered same upon the register of claims, but by reason of his ignorance neglected at that time to indorse thereon the fact that the same was probated and allowed; that the said clerk in point of fact did allow, or intended to allow, the said claim, and was under the impression that he had done

so by registering it. The said cross-petition then asks that the court enter an order, directing the clerk now to make the proper indorsement upon the claim, as of the date the same was actually presented to the clerk for probate, registration, and allowance. The cross-petition, asking for the above affirmative relief, was demurred to by petitioner. The demurrer was overruled, petitioner declined to answer it, and the court entered a decree, ordering the clerk to make the indorsement as prayed for on the claim as of the time it was originally filed for probate. From this decree this appeal is prosecuted. It is the contention of counsel for the appellee that the cross-petition avers, and the demurrer admits, that the chancery clerk as a matter of fact intended to approve the claim of the appellee at the time he registered it and did orally approve it, and that it is within the power of the chancery court to enter an order to rectify this omission; that in the first appeal of this case this court merely held that the claim could not be paid unless the indorsement, as required by section 2106, appeared on the claim; and that this failure has now been rectified by the court. The appellant contends that the very life and vitality of a claim against the estate of a decedent depends upon the indorsement in accordance with section 2106 appearing upon the claim; that no claim is probated, registered, and allowed according to our statutes unless this indorsement is made thereon; that the only proof of the probate and allowance of the claim is this written indorsement; that the mere fact that the clerk intended to allow the claim is not a compliance with the statute; that there is no such thing under our law as a probate, registration, and allowance of a claim except that which appears as the indorsement of a claim in the words of the statute. It is further contended by counsel for the appellant that after the expiration of the one-year statute within which to probate claims against the estate of a decedent, the court is

without power to order the clerk, or the clerk is without power to allow this claim. Not only does appellant claim that it is barred by section 2106, requiring these claims to be probated, registered, and allowed within one year, but that it is also barred by the three-year statute of limitations relative to open accounts.

We have carefully examined the authorities cited in the able briefs of both counsel for appellant and appellee. It seems clear to us that, under section 2106 of the Code of 1906, before a claim may be paid by an administrator, it must not only have been properly itemized in writing, signed by the creditor, and the proper affidavit thereto attached, but it is also mandatory that the clerk indorse upon the claim the words, "Probated and allowed for \$——, and registered this —— day of ——, A. D. 19—," and that he shall sign his name officially thereto. This probate, registration, and allowance is then a sufficient presentation of the claim to the executor or administrator. Without this exact or substantial written indorsement by the clerk there is no proper probate or allowance of the claim. This statute is mandatory, and directs the only way in which a claim can be properly registered, probated, and allowed, and it must be at least substantially followed. In the absence of this indorsement upon the claim, it is absolutely lifeless. It is no presentation of the same to the executor or the administrator for payment. Neither the executor nor the administrator would have a right to pay any unindorsed claim against the estate. It is the duty of the creditor, not only to properly itemize his claim and make the proper affidavit thereto, but also to see that the clerk makes the proper indorsement on the claim. Otherwise the creditor has failed to properly protect his claim. If the clerk intended to approve and allow this claim, he could and should have done so within one year. If the court was of the opinion that the clerk actually intended to approve and allow this claim, then the court had the power, within

one year before this claim was barred by the statute of limitations under section 2106, to enter an order, authorizing the clerk to approve and allow the claim under the statute. When, however, the one-year statute of limitations has run, the court and the clerk are both absolutely powerless to breathe the breath of life into a lifeless thing. Under our law there is no such thing as an oral approval and allowance of a claim against the estate of a decedent. The only competent evidence of its probate and allowance is the written indorsement of the clerk. The oral allowance or approval of the clerk set out in the cross-petition of the appellee is no more and no less than an unexecuted intention of the clerk to approve and allow the claim. The claim was never in fact legally approved and allowed by the clerk. Therefore the order of the court could in no wise give any life or vitality to this claim. "A *nunc pro tunc* entry in practice is an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake. 12 Amer. & Eng. Enc. Law, p. 84 *et seq.*, and authorities cited; *Chissom v. Barbour*, 100 Ind. 1." *Perkins v. Hayward*, 132 Ind. 95, 31 N. E. 670.

In the case of *Lehman v. George*, 99 Miss. 798, 56 So. 167, this court, speaking through Justice SMITH, held as follows:

"Where a claim is not probated against the estate of a decedent as required by law, its registration does not stop the running of the statute of limitations, and after the bar of the statute of limitations has attached the probate cannot be amended."

The purpose of the cross-appeal in this case is but to amend the attempted probate and allowance of this claim. In the same case this court, addressing itself further to the one-year statute of limitations, has the following to say:

"We are not called upon to decide whether or not the chancellor has the power to enter a decree of this character where the statute of limitations is not involved; for he is, of course, without such power when the claim, the probate of which is sought to be amended, has become barred by the statute of limitations. To hold otherwise would result in the nullification of the statute."

It is strenuously insisted by counsel for appellee that the creditor in this case did everything within his power to follow the statute, and that the failure to comply with the statute is due to the ignorance of the clerk, and that the creditor should not be made to suffer on account of the clerk's ignorance. The scheme, however, of our administration laws is that the creditor must not only comply with the statute himself, but the further duty devolves upon him to see that the clerk approves and allows his claim by proper indorsement within one year; otherwise his claim is barred.

Reversed, and decree here for appellant.

Reversed.

EPSTEIN v. FARR.

[73 South. 572, Division A.]

LANDLORD AND TENANT. *Landlord's right to preference. Statute.*

Under Code 1906, section 2851, providing that no goods in or upon any leased premises shall be liable to be taken by virtue of any writ of execution or other process whatever unless the party so taking the same shall before the removal of the goods or chattels from such premises pay or tender to the landlord or lessor thereof all unpaid rent for said premises, etc., the landlord of a store house had a lien or preference claim to the goods or on the proceeds of the sale of them and had the right to have his

claim for two months declared a preference claim against the estate of an insolvent tenant and to have the administrator required to pay it in full out of the proceeds of a sale of decedent's stock, pursuant to an order of the chancery court, though the landlord did not assert his claim within thirty days after the removal of the goods from the leased premises pursuant to a sale by such administrator.

APPEAL from the chancery court of Pike county.

HON. R. W. CUTLER, Chancellor.

Bill by Louisa G. Epstein against Mrs. Ella D. Farr, administratrix. From a decree denying complainants prayer for relief, she appeals.

The facts are fully stated in the opinion of the court.

E. Q. Williams and *J. J. Cassidy*, for appellant.

Is the language of the statute broad enough to sustain appellant's position? The language of the statute is very broad. It says no goods or chattels and etc., shall be taken by virtue of any writ of execution or other process whatever for the stock of goods was sold by the administratrix under an order of the chancery court and taken by the purchaser in pursuance of the chancery court. This was a taking under "process" as the word "process" is defined in 32 Cyc. 419, and notes page 422. The goods having thus been taken, it is the duty of the administratrix to pay the rent, and if this authority is not sufficient, the statute further provides that the officer levying shall be required to pay the plaintiff the money paid for rent as well as the money due under process.

The administratrix in taking charge of the property and selling it under an order of the chancery court, levied within the meaning of that word, as also defined in 25 Cyc., page 206, cited 32 Mississippi, for a definition of this word is given on page 469 of the opinion of the court, and the administratrix having the money in her hands it now becomes her duty to pay the landlord, appellant here, in full.

While the precise question involved in this case does not seem to have been passed upon by this court we find that this statute has been, several times, under the court's review. In *Marye v. Dyche*, 42 Miss. 347, decided in 1869, it was held that prior to an attachment for rent the tenant could sell or encumber the personal property, and those with whom he dealt would acquire a lien prior to that of the landlord. In *Stamps v. Gilman*, 43 Miss. 456, decided in 1871, the last case was affirmed and practically the same question was presented in *Shanks v. Greenville*, 57 Miss. 168. These cases do not constitute the point now under consideration, but are cited in support of appellant's contention that the lien is clearly drawn and the rights of landlord and others definitely established and that is that the landlord is entitled to the payment of his rent before the property can be moved from the premises or out of its proceeds if sold under process and the only instance where the personal property would not be liable for rent, is where it has been sold or encumbered by the owner in a lawful manner. In support of the principal for which we are contending, we cite *Paine v. Hotel Company*, 60 Miss. 360; this was a case in which Paine made an assignment for the benefit of his creditors, the assignee of course took charge of the property and handled it under instructions of the court.

It was held that the landlord was entitled to his rent in preference to the claims of the general creditors. The doctrine announced in this case was affirmed in *Paine v. Sykes*, 72 Miss. 351. In the case in the 60th Mississippi the court speaking through Chief Justice CAMPBELL, we think correctly stated the law when he said: "The landlord has a right to cause goods of the tenant liable to be taken for rent to be seized and held therefor against all the world except a purchaser in good faith for a valuable consideration."

The principle announcement in the cases last quoted, declare what seems to us to have been the intention of

112 Miss.]

Brief for appellee.

the legislature and fully support appellant's right to be paid her rent in full in this case to the exclusion of the general creditors. As throwing some light on this question we note that the Federal courts in bankruptcy proceedings, recognized the right of the landlord in Mississippi to be paid his rent in preference to other creditors.

J. T. Hutchinson, for appellee.

The sole question presented by this record is, whether the lessor of a storehouse is entitled to have a prior lien fixed upon the proceeds of a stock of goods which had been kept in the house, but sold by the administratrix of the lessee, under an order of the chancery court, and removed from the store more than thirty days before any steps were taken to assert or establish a lien for unpaid rent, no effort having been made to seize the goods or to fix a lien upon them in any shape or form, but the goods were sold at public outcry as authorized by the order of the court and brought in by parties and remained in the storehouse in which they were stored for sometime after the sale of same to the purchaser at the administratrix sale.

Under Section 2851 of Code of 1906, it is contended by appellant that they have given them a lien on the goods stored in the storehouse for the rent in arrears and owing by the lessee the deceased A. S. Farr, and that the amount of their claim should be paid out of the proceeds of the sale by the administratrix in full for the reason that they have a lien given by this section of the code on goods stored in the store. You will notice from the reading of this section of the code that there is not even a suggestion to the landlord that he has a lien on goods stored in his house for rent of same, the landlord only has a lien on the goods sold by him to his tenant as supplies (such as horses, mules and farming implements), and products grown by the ten-

Opinion of the court.

[112 Miss.]

ant upon the rented premises, and this is all that is covered by the lien of the landlord as provided by section 2832 of Code 1906 —The goods stored in this store were not sold by the landlord to the tenant but same were acquired in the regular mercantile business from various parties in the regular course of business, and are not subject to any lien in favor of the landlord in preference to other creditors of this estate, if the landlord had thought that she had a lien on the goods stored in the storehouse then it was her duty to attach said goods before same were sold at the public sale by the administratrix, but there was no lien then and none now, if the goods stored in the house had been goods that had been sold to the tenant by the landlord then the landlord would have had a lien on same and could have attached same for rent, or could have required an officer levying an execution on said goods to first pay to the landlord her rent, but there was no lien; therefore the administratrix is not required to pay claim of landlord for rent in arrears in full but the landlord stands with all other creditors and must be paid rateably.

The preference claims against the estate of a deceased are as follows—The expense of last sickness, for burial or funeral and for the administration, including commissions, etc. See section 2113 of Code 1906. We insist that the decree of the chancellor holding that the landlord had no prior lien on the stock of goods is correct and said decree should be upheld by this court.

SYKES, J., delivered the opinion of the court.

Louisa G. Epstein, appellant here filed a bill in the chancery court of Pike county against Mrs. Ella D. Farr as administratrix of the estate of A. S. Farr, alleging that during the lifetime of the said Farr complainant had rented to him a storehouse for a period of one year at a rental of thirty-five dollars a month, and that there

was due and owing to her at the time of the death two months' rent, or seventy dollars. Complainant prayed that this claim be declared a preference claim, and that the administratrix be required to pay the same in full out of the proceeds of sale of the stock of goods, before paying any general creditors. The lower court denied her prayer for relief, from which decree this appeal is prosecuted.

The agreed statement of facts in the case shows that the above amount was due her by the deceased as rental at the time of his death, that the estate was insolvent, and that under an order of the chancery court, the stock of goods belonging to said estate and in the storehouse of appellant was sold over thirty days before the institution of this suit, and the proceeds of sale are now in the hands of the administratrix. The estate of the deceased had been declared to be insolvent before this suit was instituted. A year's support to the widow and children had been allowed and set apart for them. The agreed statement of facts also shows that under similar contracts for rent the deceased was due D. E. Lampton & Co. one hundred dollars for rent and Mrs. A. I. Teunnison twenty-five dollars for rent, and that the right of recovery of these appellants is controlled by that of the appellant, Epstein. The appellant landlord bases her claim to the rent under section 2851 of the Code of 1906, which reads as follows:

"That no goods or chattels, lying or being in or upon any messuage, lands or tenements, leased or rented for life, years, at will, or otherwise, shall at any time be liable to be taken by virtue of any writ of execution, or other process whatever, unless the party so taking the same shall, before the removal of the goods or chattels from such premises, pay or tender to the landlord or lessor thereof, all the unpaid rent for the said premises, whether the day of payment shall have come or not, provided it shall not amount to more than one

year's rent; and the party suing out such execution or other process, paying or tendering to such landlord or lessor the rent unpaid, not to exceed one year's rent, may proceed to execute his judgment or process; and the officer levying the same shall be empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the money due under the process, and when the rent contracted for is payable, not in money, but in other things, the creditor shall pay the landlord the money value of such things."

It is contended by the appellee that the above section does not give the landlord any lien or preference claim on the goods or on the proceeds of the sale of them, nor give her any preference over other creditors of the estate. It is further contended that if any preference claim or lien existed, then it should have been asserted at least within thirty days after removal of the goods under section 2850, Code of 1906. It is further contended that the only preference claims against the insolvent estate of a deceased person are those set out in section 2113 of the Code of 1906. This question has been expressly settled by this court in favor of the appellant here in the case of *Rice v. Harris*, in 76 Miss. 422, 24 So. 880. The facts are quite similar to those in the case at bar. Judge TERRAL in that opinion says:

"By reason of the assignment of the goods by Harris to Slack, under chapter 8, Annotated Code, thereby placing the goods on the demised premises in the hands of the chancery court, so that to distrain it by Rice would be a contempt of said court, has the right of the lessor been destroyed? We think not. The right which the lessor had, unless the assignment had been made, to seize the goods for the payment of his rent, is not available at law, by reason of the assignment, but on that account it is a good foundation for a claim in the chancery court, where the assigned goods are administered, and for a decree there for such claim. If we

understand counsel for appellee, they suppose that Rice might have a good claim for the intervention of the chancery court, if he had filed his cross-petition within thirty days from the time the goods were removed from the rented premises. We do not perceive that the removal of the goods from the demised premises affect in any way the rights of Rice. Hirsh was a *bona fide* purchaser of the goods, and, in his hands, they were not subject to be attached by Rice, whether they were on the premises, or within thirty days from a removal therefrom. Hirsh was a purchaser under the decree of the court, and by this proceeding in court, and under the decree of the court, Rice was precluded from going against the property sold, and for that reason gives him a right to demand of the assignee of the goods the payment of his rent from the money produced by a sale of the property, which the proceeding in the chancery court had precluded him from attaching to pay them."

In the case at bar the estate was being administered in the chancery court, just as was the estate of Harris being administered in said court by virtue of his assignment.

Reversed, and decree here for appellant.

Reversed.

CITY OF JACKSON v. MERCHANTS BANK & TRUST COMPANY.

[73 South. 573, Division A.]

MUNICIPAL CORPORATION. Streets. Encroachments. Estoppel of city.

Where complainant's predecessor in title owned a triangular lot at the intersection of two streets and desiring to erect a building thereon employed a contractor to erect such building who obtained a permit from the clerk of the city but was told by him

that before the building could be erected it would be necessary for the city engineer to establish the street lines at that point and accordingly the city engineer did establish such street lines, but erroneously placed the street line on one of the streets several feet over the true and correct line. In such case where the building was erected on the line given by the city engineer and extended several feet into the street, the city was estopped from injuring or damaging the building while it stood on the strip of ground in the street, but the public was not divested of title to such strip, and complainant's only right was to have its possession quieted and confirmed so long as the wall might stand on the strip.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Bill by the Merchants Bank & Trust Company against the City of Jackson. From a decree granting relief in part both sides appeal.

The facts are fully stated in the opinion of the court.

Wm. Hemmingway, for appellant.

Granting that estoppel applies to municipal corporations, the act must be within the scope of the authority of its officers. (28th. Cyc., 465.)

In only two cases has the doctrine of estoppel even been hinted at by our court. They are *Witherspoon v. Meridian*, 69 Miss. 288, 13 So. 843; *Vicksburg v. Marshall*, 59 Miss. 563. In the *Witherspoon* case the court said it was conceivable that estoppel might arise, and in the *Marshall* case it said it was possible as to certain persons the city was estopped to deny the correctness of a doubtful survey, but did not say it was estopped as to appellee, Marshall.

In the *Marshall* case the people had built on the line on which Marshall had also built. The attempt of the city was to force him back and place him out of line with the buildings previously constructed. In this case the city is attempting to make the Merchants Bank & Trust Company get back on the line with the other property-owners.

The city found it necessary when they paved Robinson street to establish the grade by an ordinance. It is true they would have to get their information from a survey. If it is necessary to establish a grade by an ordinance, how much more necessary is it that property lines should be acted on by the council?

Unless the courts prevent the councils and boards of aldermen from disregarding the rights of the public on streets, it might be very easy for certain of these people to acquire a preference in these streets. The streets might be closed for the purpose of some one to construct a building on it.

It must be borne in mind that this building was constructed in 1906, and in 1908 acting by ordinances, sidewalks were laid on the north side of Robinson street from Short street to the city limits on the line claimed to be correct by the city, showing no intent of the city to acquiesce in the line on which this building was constructed, and was due notice to any one encroaching on the street that the city intended to claim the full width from the city limits to Capitol street.

Can the city be estopped by an unauthorized act of a city employee, it being also an act which the power to perform cannot be delegated by the legislative body of the city, when the party dealing with the city had knowledge of the condition and is charged with the knowledge of the power of the agents of the city? There is no evidence to show that the city made any compensation to the abutting property-owners at any time.

Appellee and cross-appellant either wholly misconceives or deliberately evades appellant's and cross-appellee's theory of this case. The brief of appellee and cross-appellant is neither responsive to the state of facts nor the authorities cited as sustaining its contention.

In quoting from the decision in the case of *Witherspoon v. The City of Meridian*, 69 Miss. 288, 13 So.

843, attorneys for the appellee come to a period too soon. Judge CAMPBELL who wrote the decision in that case added to the quotation of the attorneys "but this is not one."

The state of facts in the case of *Krause v. The city of El Paso*, 101 Texas, 211, 14 L. R. A. (N. S.) 582, is in nowise parallel with the state of facts in the case at bar for the reason that Mrs. Lewis, through her agent with knowledge accepted the line in the face of and in spite of positive admitted present knowledge of the fact that the line so accepted was an encroachment upon the street as dedicated, marked out by monuments, accepted by the public and used as a highway.

In addition to this, the rule in Texas bearing upon the operation of the statute of limitation is different from the Mississippi rule. The doctrines of equitable estoppel and the limitation of action are analogous. In Texas the statute of limitation operates against a municipality. See Elliott on Roads and Streets, Vol. 2, paragraph 4187, note 73. Upon a checking of the cases as authority for the proposition, that a municipality can be equitable estopped, develops that fact that many of the cases so cited arise in those states in which the doctrine of the operation of the statute of limitation against municipalities has been adopted. In Iowa the statute of limitation operates against municipalities; In Illinois and Montana title can be acquired by prescription. *Oliver v. Synhorst*, 48 Oregon, 293, 7 L. R. A. (N. S.) 243, and note cited as authority to sustain the doctrine announced in Vol. 10, Ruling Case Law, pages 712-713, has been superceded by the latter case of the *City of Portland v. Poulson Lumber Company*, 46 L. R. A. (N. S.), page 1311, which last case was followed by the learned chancellor in the decree rendered by him in this cause.

In Mississippi the statute of limitation does not operate against a municipality. Because of its very nature

the doctrine of *stare decisis* does not apply to an equitable estoppel against a municipality.

The court can look at the facts in this case and do pure justice to the public, unhampered and untrammelled by prior utterances of the court even had they been statements of the law and not *obiter dicta* as they were.

Mayer, Wells, May & Sanders, for appellee.

This case is controlled by the beneficent doctrine of estoppel *in pais* against the municipality, the city of Jackson, appellant herein, as was correctly held by the chancellor. But the chancellor erred in limiting the city's estoppel to such time as the building as at present constructed should remain standing.

The rule governing this case is succinctly stated in Volume 10, Ruling Case Law, pages 712 and 713, as follows:

"Consequently courts in many cases have applied the rule that a municipality may be equitably estopped, as against an abutting owner on a highway, street or alley, who has been encouraged or permitted to make improvements on his property with reference "to what he believed in good faith to be the correct line, from establishing the true line, if its establishment would necessitate the removal of such improvements or result in their irremediable injury."

And in support of this statement of the rule, the following cases are cited: Note 3. *Carlinville v. Castle*, 177 Ill. 105, 52 N. E. 383, 69 A. S. R. 212; *Lee v. Harris*, 206 Ill. 428, 69 N. E. 230, 99 A. S. R. 176; *Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N. E. 286, 120 A. S. R. 258; *Pella v. Scholte*, 24 Ia. 283, 95 Am. Dec. 729; *Smith v. Osage*, 80 Ia. 84, 45 N. W. 404, 8 L. R. A. 633; *Von Tobel v. Lewistown*, 41 Mont. 226, 108 Pac. 910, 137 A. S. R. 733; *Oliver v. Synhorst*, 48 Ore. 292, 86 Pac. 376, L. R. A. (N. S.) 243 and note. Notes: 18 L. R. A. 147, 36 L. R. A. (N. S.) 1057.

Immediately following the statement of the above general rule, the author continues: "Especially when the city has run the street line, will it be estopped to change such line to the correct position so as to necessitate the destruction of a building erected in accordance with the line so run."

In support of this announcement is cited the case of *Krause v. El Paso*, 101 Tex. 211, 106 S. W. 121, 130 A. S. R. 831, 14 L. R. A. (N. S.) 582, and this case is highly interesting and instructive; almost identical in its facts, except that the facts of the instant case called even more strongly for the application of the principle than in the *Krause* case.

The rule is stated in 3 *McQuillan on Municipal Corporations*, sec. 1398, pages 2973, 2974, 2975, 2976; 2 *Dillon on Municipal Corporations* (4 Ed.), section 675; *Von Tobel v. City of Lewistown*, 41 Mont. 226, 108 Pac. 910, 137 A. S. R. 737; *Vicksburg v. Marshall*, 59 Miss. 563; *Witherspoon v. Meridian*, 69 Miss. 288, 13 So. 843; *Webb v. Demopolis*, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62, 44 L. R. A. 407; *Mobile v. Sullivan Timber Co.*, 129 Fed. 298, 63 C. C. A. 412; *Philadelphia Mfg. & Tr. Co. v. Omaha*, 63 Neb. 280, 93 Am. St. Rep. 412, 88 N. W. 523; *Simplot v. Chicago M. & S. Ry. Co.*, 5 McCrary, 158, 16 Fed. 350; *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. W. 326.

The doctrine here stated is well supported by many well considered cases, from which we cite the following: *City of Big Rapids v. Comstock*, 65 Mich. 78, 31 N. W. 811; *Peoria v. Johnson*, 56 Ill. 45; *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759; *Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E. 383; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 531; *Simplot v. Dubuque*, 49 Iowa, 630; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108. Why should a municipal corporation which has led a citizen into error and caused him to expend large sums of money in the erection of permanent improvements upon a portion of the highway, after

twenty years' occupancy, be permitted to destroy the improvements without compensation, simply to assert a legal right? A sense of justice common to all civilized people revolts at such a rule of legalized wrong.

The court will perceive that our complaint of the chancellor's decree is the limitation of the time fixed by the decree of the city's estoppel. We maintain that our title to the narrow strip of land in question should be confirmed and quieted perpetually. As was done by our court in the case of *Vicksburg v. Marshall, supra*, and in the other cases cited in support of the statement in Volume 10 R. C. L. *supra*.

We respectfully submit that the chancellor's decree should be affirmed on direct appeal and reversed on cross-appeal and final decree should be entered by this court granting the prayer for relief in appellee's original bill, and quieting and confirming appellee's title to the strip of land occupied by said building as at present constructed.

HOLDEN, J., delivered the opinion of the court.

The appellee, Merchants Bank & Trust Company, exhibited its bill in the chancery court of the First district of Hinds county, seeking confirmation of its title to a strip of land occupied by it, and alleged to be part of Robinson street in the city of Jackson. The appellant, city of Jackson, filed its answer and cross-bill, denying that the appellee was entitled to the relief prayed for in the bill of complaint, and prayed that the appellant, city of Jackson, be decreed the possession of the said strip of land in controversy and that the building be removed therefrom. From a decree granting the relief, in part, as prayed for by the complainant in the court below, the appellant, city of Jackson, appeals here; and the appellee, Merchants' Bank & Trust Company, cross-appeals to this court, contending that the whole relief prayed for should have been granted to it by the lower court.

This legal controversy is based upon the following state of facts: About ten years before this suit was filed in the lower court, Mrs. Gillie Lewis owned a triangular lot at the intersection of West Capitol and Robinson streets in the city of Jackson; the said lot abutting on the said two streets. Mrs. Lewis employed J. C. Mathews, a building contractor, to erect a two-story brick building on said lot. Contractor Mathews applied to the proper city official of Jackson for a building permit, which was issued, and the officer issuing the permit informed the contractor that it would be necessary for the city's engineer to establish the street lines of Robinson and West Capitol streets at this lot before building operations could be commenced in the erection of said building. Accordingly, the contractor applied to the city engineer in the employ of the city, requesting him to establish said street lines, and delayed starting the building operations for several days waiting on the city engineer to so establish the said lines. The said city engineer, acting within the scope of his employment, and in the performance of the duties of this office, surveyed, established, and marked the said street lines at the intersection of the said streets adjoining the lot in question; and the building was constructed and erected on said lot in conformity with said street lines so established by the city engineer. It appears now that the south wall of said brick building is several feet over the true and correct line in Robinson street. There was no objection on the part of any officer of the city, nor of any citizen thereof, as to erecting the building where it now stands. The correctness of the lines so established by the city engineer, or the right to occupy the strip of land by the building in conformity to such lines, was not disputed or objected to, nor even mentioned, until about ten years after the building was erected and the property had passed by conveyances into the hands of the appellee Bank. The appellee endeavored to have its title

to this strip of land made secure, and the strip vacated by the city, by an ordinance of the city; but, for some reason, the ordinance was passed and then repealed, whereupon the appellee filed its bill to have confirmed and quieted its title to the strip of land here in question, alleging that the south wall of the building erected upon the said lot is several feet over the line into Robinson street, and setting up the facts showing the cause of the mistake in erecting the building over the line into the street. The chancellor had a full hearing of all the facts and circumstances in this case, and his finding of fact is here copied from his decree:

“That the predecessor in title to the complainant of that part of lot No. 13 of block No. 9, being a triangular lot at the intersection of Robinson and West Capitol streets, desired to erect a substantial two-story brick building thereon, and, before doing so, was required by the municipal authorities of the city of Jackson to delay the building of said brick storehouse until the city engineer should locate the street lines, and that the line upon which the south wall of said building was built was located and marked out by the city engineer of the city of Jackson personally, or by some subordinate sent for that purpose, and the said line so marked out by the city engineer was held out to the then owner of the property as the north line of Robinson street, and that the then contemplated two-story brick building was at large expense erected along and in conformity to the line so marked and designated by the city engineer as the north line of Robinson street, as to all parts of said building except the gallery, which extends into the street beyond the line of the building, and the then owner of said property acted in good faith and relied upon the accuracy of the line which the municipal authorities of the city of Jackson required her to get from the city engineer before she was permitted to erect said building, and for a long period of time, to wit, about ten years, the said building so erected has

stood upon said lot projected into the street, without objection from any party interested in the matter."

Upon this finding of the fact the chancellor decreed that:

"The city of Jackson is now estopped to claim that part of Robinson street consisting of a narrow strip upon which is the south wall of said building, so long as the building and wall stands there."

The relief granted to the appellee was based upon the doctrine of estoppel *in pais*. The appellant contends that estoppel *in pais* cannot be successfully invoked here against a municipality, for the reason that the acts of the officers of the municipality are not binding upon the city, and can, in no event, divest the city of its title and interest in the public streets thereof. The appellant also urges that the contractor, Mathews, who was the agent of Mrs. Lewis, the grantor of appellee bank, knew at the time he erected the brick building on the lot that he was building several feet over the line into Robinson street, and that the line established by the city engineer was not the true and correct line; that, consequently, the appellee bank had notice, through its grantor, and her agent, Mathews, the contractor, as to the true and correct lines of the property; and therefore estoppel *in pais* cannot be successfully invoked here. But it appears from the testimony in this record, and especially by the finding of fact of the chancellor, that the contractor, Mathews, did not pretend to know the true and correct lines, but merely stated that, according to the old fence lines, he thought the newly established line by the city engineer was several feet over into Robinson street; but the city engineer established, marked, and pointed out what he said was the true and correct lines, and instructed the contractor to build according to the lines he had officially established. There is no merit in this latter contention of the appellant, city of Jackson.

The only question presented in this case that deserves serious consideration is whether or not the doctrine of estoppel *in pais* is applicable here against the municipality of Jackson. It seems to be well settled that the doctrine of equitable estoppel may be successfully invoked against a municipality in cases where the particular facts justify its application.

"Consequently, courts in many cases have applied the rule that a municipality may be equitably estopped, as against an abutting owner on a highway, street, or alley, who has been encouraged or permitted to make improvements on his property with reference to what he believed in good faith to be the correct line, from establishing the true line, if its establishment would necessitate the removal of such improvements or result in their irremediable injury." 10 R. C. L. 712, citing, in note 3, the following cases: *Carlinville v. Castle*, 177 Ill. 105, 52 N. E. 383, 69 Am. St. Rep. 212; *Lee v. Harris*, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176; *Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N. E. 296, 12 L. R. A. (N. S.) 687; *Chicago v. Illinois Steel Co.*, 229 Ill. 303, 82 N. E. 286, 120 Am. St. Rep. 258; *Pella v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729; *Smith v. Osage*, 80 Iowa, 84, 45 N. W. 404, 8 L. R. A. 633; *Von Tobel v. Lewistown*, 41 Mont. 226, 108 Pac. 910, 137 Am. St. Rep. 733; *Oliver v. Synhorst*, 48 Or. 292, 86 Pac. 376, 7 L. R. A. (N. S.) 243 and note; Notes: 18 L. R. A. 147; 36 L. R. A. (N. S.) 1057.

See, also, 2 Dillon on Municipal Corporations (4th Ed.), sec. 675.

"Especially when the city has run the street line will it be estopped to change such line to the correct position so as to necessitate the destruction of a building erected in accordance with the line so run." 10 R. C. L. 713.

This court, in the cases of *Vicksburg v. Marshall*, 59 Miss. 563, and *Witherspoon v. Meridian*, 69 Miss. 288, 13 So. 843, indicates very clearly that the doctrine of

equitable estoppel for the protection of individuals against injury to property, in proper cases, may be successfully invoked against municipalities. In *Weather-spoon v. Meridian*, 69 Miss. 288, 13 So. 843, Chief Justice CAMPBELL said:

“And we are not willing to declare against the doctrine of equitable estoppel as applied to protect individuals against municipal claims under some circumstances. There may be cases where we would not hesitate to use the beneficent doctrine of estoppel *in pais* against a municipality.”

We are easily persuaded that, with the facts of the instant case before him, that eminent jurist would have applied the doctrine of estoppel *in pais*; and we think the facts and circumstances here are sufficient to justify the application of the doctrine against the appellant municipality.

In the case of *Krause v. City of El Paso*, 101 Tex. 211, 106 S. W. 121, 14 L. R. A. (N. S.) 582, 130 Am. St. Rep. 831, the question here involved is fully and ably discussed by the Texas court, and we agree with the rule announced in that case. The court, in that case, said:

“Ordinarily, a municipal corporation is not subject to estoppel by reason of the negligent or unauthorized acts of its officers; but it is generally recognized that there are exceptions to that rule.”

And it held that the city of El Paso was estopped in a case where the facts are very similar to those in the controversy here.

After a careful consideration of the case at bar, we think that it comes within the exception to the rule, and that the appellant should be estopped and precluded from injuring and damaging the property of the appellee, while it stands on the strip of ground in the street, which was erected there with the consent and by express direction of the municipality through its authorized agents.

But the appellee bank contends in its cross-appeal that the lower court should have granted the full relief asked for in its bill, by decreeing a perpetual injunction against the municipality, forbidding it from ever disturbing appellee in the use of the strip of land in question, or in other words, to vest, in effect, the complete fee simple title in the appellee. As to this, we disagree with the appellee. In applying the doctrine of equitable estoppel in this character of case, a court of equity cannot be called upon to do any more than to prevent the municipality from injuring the individual. The court will not divest the public of the title, as appellee acquired no title by lapse of time, under the doctrine invoked; but all that a court of equity should be expected to hold is that the municipality must not injure or destroy the property of the individual, even though it be in the street, because by its own acts and representations the mistake was made and the condition created. Equity will not take from the public any property rights that are not absolutely necessary to be taken in order to preserve the rights of the citizen, against whom the municipality is merely estopped.

Therefore we hold that the decree of the chancellor, decreeing "that complainant's right of possession thereof is hereby quieted and confirmed, so long as the wall may stand upon the said strip of land where so located." is eminently correct.

In view of these conclusions, we think the decree of the chancellor should be affirmed, both on direct appeal and cross-appeal.

Affirmed.

NEBLETT ET AL. v. NEBLETT ET AL.

[73 South. 575, Division B.]

DESCENT AND DISTRIBUTION. *Law governing. Personalty. Statute.*

Under Rev. Code 1871, section 1950 (Code 1906, section 1648), declaring that personal property within the state shall descend and be distributed according to the laws of this state notwithstanding the domicile of the deceased may have been in another state, the descent of a leasehold interest in school land situated in this state is controlled by the laws of this state notwithstanding the domicile of deceased may have been in another state and under Code 1906, section 5081, which avoids the lapse of legacies on the death of the legatee during the lifetime of the testator only when the legatee left a child surviving, a legacy of such leasehold interest will lapse on the death of the legatee without children, though it would not lapse under the statute of the state where the testatrix was domiciled.

APPEAL from the chancery court of Bolivar county.
HON. JOE MAY, Chancellor.

Suit by S. S. Neblett and others against N. F. Neblett and others for partition. From a decree denying plaintiff rights to part of the property, he appeals.
The facts are fully stated in the opinion of the court.

Sillers, Owen & Silbers and Green & Green, for appellant.

The several questions involved in the assignment of error may be treated together. To uphold the decree, the court must hold that a leasehold estate for ninety-nine years in land, a part of a plantation, is to be controlled, in descent, by a foreign statute, contrary to our statute and the public policy of the state of Mississippi.

It is settled, except when changed by statute that: "The general rule is that a legacy or devise will lapse where the legatee or devisee dies before the testator, and passes to the heirs at law of the testator."

112 Miss.]

Brief for appellant.

18 Am. & Eng. L. (2 Ed.), p. 748, citing a large number of cases, among them *Cady v. Cady*, 67 Miss. 425; see, also 1 Jarman on Wills (6th Ed.), 423, et seq. and 451.

The statute of Mississippi, sec. 5081, Code 1906, provides: Whenever any estate of any kind shall or may be devised or bequeathed by the last will and testament of any testator or testatrix to any person being a child or descendant of such testator or testatrix, and such devisee or legatee shall, during the lifetime of such testator or testatrix, die testate or intestate, leaving a child or children, or one or more descendants of a child or children, who shall survive such testator or testatrix, such devise or legacy to such person so situated as above mentioned, and dying in the lifetime of the testator or testatrix, shall not lapse, but the estate so devised or bequeathed shall vest in such child or children, descendant or descendants, of such devisee or legatee, in the same manner as if a legatee or devisee had survived the testator or testatrix, and had died unmarried and intestate."

It is to be noted that the Mississippi statute avoids a lapse only when the devisee or legatee is "a child or descendant of the testator," while the Virginia statute *infra*, avoids a lapse in all cases.

The Mississippi statute would not avoid the lapse in the case at bar, for the devisee or legatee was the brother of testatrix and not, as required by the Mississippi statute, "A child or descendant of the testator." This construction as to the land owned in fee was adopted by the court, and is not appealed from.

In Virginia, section 2522, Code of 1906, provides: "If a devisee or legatee die before the testator leaving issue, who survive the testator, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived

the testator, unless a different disposition thereof be made or required by the will."

This statute changes the rule of the common law and substitutes a statutory limitation. *Wood v. Sampson*, 25 Gratt. —; *Wildberger v. Cheek*, 94 Va. 520. The question arises then: Is this leasehold governed by the laws of Virginia or by the laws of Mississippi? Treated as personal property it descended to the heir of the testator. *Partee v. Kortrecht*, 54 Miss. 69; *Carroll v. McPike*, 53 Miss. 569; *Jahier v. Rascoe*, 62 Miss. 704; *Speed v. Kelly*, 59 Miss. 47.

Under the laws of Mississippi, this leasehold estate, if treated as personalty, descended to the heirs at law of the testator when Norman M. Neblett, the legatee, died before the testatrix.

This sixteenth section was a part of the Green Island Plantation, was cultivated and used as a part in the business of the testatrix in the state of Mississippi, and had its *situs* here as much as the fee simple title to the lands.

Conflict of laws. Right to each state to regulate the transfer of property within its jurisdiction. *Wells v. Wells*, 35 Miss., 639; *Cruso v. Butler*, 36 Miss. 150.

Change of statute as to descent of estate for years in land. *Dillingham v. Jenkins*, 7 Smed. & M. 479, 487; *Faler v. McRae*, 56 Miss. 227.

Descent as land. Under section 1584, Code 1906, *supra* "an estate for years" in land would not be "personal property" under sec. 1591, Code 1906, and when by the provisions of that code the descent of "land" is provided for, and "land" is defined to be "an estate for years" in land, it would follow; that when "descent of land" was provided for by sec. 1649, Code 1906, it governed this "estate for years" in land and vested it in the heirs at law of the testatrix.

It is immaterial that our court in *Moss Point Lumber Co. v. Harrison County*, 89 Miss. 448, interpreted the instruments executed under the Act of 1833 as "leases," for, even if leases for years, under the definition in the Code of 1906 as to what shall constitute land, these leases would be "an estate for years in land" and would be embraced as "land" and would descend as "land."

Leases of sixteen sections in this state occupy a unique position, and are not to be measured by the rules of ordinary leases as to *situs*; for they are created under the statutes of the state of Mississippi, but *quasi*-public schools, are peculiarly of local statutory character and administration; and while in *Moss Point Lumber Co. v. Harrison County*, 89 Miss., *supra*, a majority of the courts held that these leases, under the Act of 1833, did not convey a defeasible fee (as held by the majority of the court constituted by Judge CALHOON and TRULY, in the first opinion) and they were held by a majority of the court as reconstructed, to be leases for years, overruling the first opinion, still, it is manifest from the history of the decisions and legislation, that the "lessee," under the Act of 1833, acquires a greater estate than would be acquired under an ordinary lease.

The court has held that the lessee has the right to cut and remove the timber—a part of the land—and sell it for his own benefit, when he devotes the land to agricultural purposes. *Gans v. Warren County*, 80 Miss. 86; *Fernwood Lumber Co. v. Rowley*, 71 So. 3; *Dantzler Lumber Co. v. State*, 97 Miss. 335.

If the lessee is vested with such an interest in the land as that the lessor can only sell the timber which is a part of the land to the lessee, and to no one else, it is manifest that the lessee acquires more than a common-law leasehold estate for years in the land. However, this may be, it is not essential to the propositions for which we contend, for; as stated, under

the statutes of Mississippi, if this leasehold is "personal property," it descends to the heirs at law of the testatrix; for it is "situated in the state." As to *situs*, there is no difference in the situation of the land held by fee simple title in Green Island Plantation and that held by lease as a sixteenth section. Each is a part of this Plantation and subject to all of the incidents of the business of farming carried on therewith.

If land, under the statutes of Mississippi, it, also, descends to the heirs at law of the testatrix.

Campbell & Cashin, attorneys for appellees.

The pivotal question by the record in this case is, substantially, this: Is the bequest made in the last will and testament of Ann S. Neblett to her brother, Norman M. Neblett, in so far as her leasehold interest in section 16, composing a part of "Green Island Plantation," is concerned, governed by the laws of Virginia, the state of the testatrix' domicile, or by the laws of Mississippi, the state in which said plantation is situated, in determining whether or not said bequest lapsed in consequence of the death of Norman M. Neblett prior to the death of the testatrix?

If the laws of the state of Virginia govern, as to that, the bequest as to said leasehold interest did not lapse in consequence of the death of Norman M. Neblett prior to the death of the testatrix, but the same passed to appellees as his children and issue, who survived the testatrix, and the decree of the court below should be affirmed.

Section 2523 of the Virginia Code, in force at the time said will was made, reads as follows: "If a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done, if he had survived the testator, unless a different disposition therefore be made or required by the will."

See also *Wood v. Thompson*, 25 Grat. (66 Va.) 245; *Wilderberger v. Cheek*, 94 Va. 517. The question then is, does the law of that state govern this matter? It is the general rule that personal property, having no *situs* but that of the owner, is subject to and governed by the law of the owner's domicile. American and English Ency. of Law, Vol. 22, pages 1322, 1355 and 1362; *Sturdivant v. Neill*, 27 Miss. 157; and the law of the testator's domicile, at the time of his death, is the proper law for determining whether a bequest of personal or movable property lapses by the death of the legatee in the testator's lifetime.

American and English Ency. of Law, Vol. 22, page 1374, a leasehold estate, or an estate for years, in land, is personal property, and a lease for ninety-nine years is of no greater dignity than a lease for one year. *Dillingham v. Jenkins*, 7 S. and M. 479; *Faler v. McRae*, 56 Miss. 227; *Lumber Co. v. Harrison Co.*, 89 Miss. 448; 32 Cyc. pages 663 and 668; 22 American and English Ency. of Law, page 1360; *Despard v. Churchill*, 53 N. Y. 192.

It remains for us to consider, whether or not the rule announced by the above cited authorities has been changed by the statutes of Mississippi, for we recognize the competency of this state to give to personal property the character of real estate, if desired, and such desire be clearly expressed; but we respectfully submit that nowhere in the statute laws of Mississippi is it declared or stated that a leasehold interest in land is real estate or land.

Section 1584 of the Code of 1906 provides that: "The term 'land,' when used in any statute, shall include all corporeal hereditaments, whatever, and any interest therein, whether an estate for years or a different estate." That section does not define "an estate for years" or state that the same shall constitute land or real estate, but simply provides that the term "land,"

when used in any statute shall include an estate for years.

Likewise, section 1591 of the Code of 1906, does not define the term "personal property," but simply states that, when that term is used in any statute, it shall include certain things therein enumerated. Where no statute using the term "land," or the term "personal property," is involved, the character of land, as land, and of personal property, as personal property, remains as defined by common law.

So that, when called upon to construe a will, as in the case at bar, the character of property, whether it be real or personal, is to be determined by the common law.

Section 1575 of the Code of 1906 provides that, "The term 'bond,' when used in any statute, shall embrace every written undertaking for the payment of money, etc;" and yet the supreme court, in *McLeod v. State*, 69 Miss. 221, held that said section did not undertake to define what a bond was, but only to embrace within the term certain instruments; and that what was a bond, independent of that section, was all the same a bond.

The court will observe that the language of this section as to what shall be embraced within the term "bond" is exactly the same language as used in section 1584, in reference to the term "land," and as used in section 1591, in reference to the term "personal property;" so that, if section 1575 did not undertake to define "bond", it must follow that other two sections did not undertake to define what was "land" or "personal property."

See *Lewis v. Glass*, 92 Tenn. 147; *Orchard v. Wright etc., Store Co.*, 225 Mo. 414. There is nothing in any provision of the chapter on "descent and distribution" of the Code of 1906, which changes the rule contended for by us.

. Cook, P. J., delivered the opinion of the court.

Mrs. Ann S. Neblett, a resident of the state of Virginia, owned a plantation in Bolivar county, Miss., known as "Green Island Plantation." Section 16, township 20, range 8 west, formed a part of this plantation. Mrs. Neblett died in 1912. Appellants filed a bill in the chancery court alleging that they and appellees were owners in common by inheritance of the Green Island Plantation, and prayed that the land be partited. Appellees admitted in their answer that appellants were entitled to a partition of all the land described in the bill of complaint, except section 16, and denied that appellants had any interest in section 16, claiming that appellees were the exclusive owners of that section. The basis of appellee's title to section 16 rests upon these facts, viz.: Mrs. Ann S. Neblett, deceased, through whom all parties to this litigation claim, owned the unexpired lease of section 16, and the fee-simple title to the other lands composing Green Island Plantation; Mrs. Neblett made a will, devising to her brother, Norman M. Neblett, who died before the testatrix, Green Island Plantation. It was the contention of appellees that inasmuch as Mrs. Neblett was at the time she executed her will, and at the time she died, a resident of Virginia, the legacy to her son of the leasehold interest in the sixteenth section did not lapse, but passed to appellees as the children and issue of Norman M. Neblett, the legatee under the will. This contention of appellees was based upon the theory that the estate in the lease of the sixteenth section was personal property, and that the devolution of personal property is controlled by the laws of Virginia, the domicile of the testator. The trial court adopted this view of the law, and appellants appeal to this court.

Appellants take the position that the descent of the property in question is governed by our statute, section 5081, Code of 1906, which reads this way:

“Whenever any estate of any kind shall or may be devised or bequeathed by the last will and testament of any testator or testatrix to any person being a child or descendant of such testator or testatrix, and such devisee or legatee shall, during the lifetime of such testator or testatrix, die testate or intestate, leaving a child or children, or one or more descendants of a child or children, who shall survive such testator or testatrix, in that case, such devise or legacy to such person so situated as above mentioned, and dying in the lifetime of the testator or testatrix, shall not lapse, but the estate so devised or bequeathed shall vest in such child or children, descendant or descendants, of such devisee or legatee, in the same manner as if a legatee or devisee had survived the testator or testatrix, and had died unmarried and intestate.”

The statute just quoted avoids the lapse of the legacy only when the legatee or devisee is “a child or descendant of the devisee or legatee,” while the Virginia statute goes further and avoids a lapse in all cases. The Virginia statute is section 2523 of the Virginia Code of 1904, and provides:

“If a devisee or legatee die before the testator, leaving issue who survived the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will.”

The question we are to decide is the unexpired leasehold of the sixteenth section governed by the statutory law of Virginia, or by the statutes of our state. It is pointed out in the briefs of appellants that the laws of this state referring to the administration of estates are *sui generis*. It seems that in other states, in which list Virginia is included, when a resident dies owning

personal property in another state, the rule is to administer the personal property through an ancillary administration, and after the debts are paid, if there be any surplus in the ancillary administration, the surplus is remitted to the domiciliary administration for administration there. On the contrary, as held by this court in *Partee v. Kortrecht*, 54 Miss. 69, ancillary administrations have been abrogated in Mississippi by our statutes.

Again, we quote from the opinion of this court, in *Carroll v. McPike*, 53 Miss. 569, viz.:

"The general doctrine, as declared by Story, in Conflict of Laws, section 518, is that an administration in any other country than that of the domicile of the deceased is treated as in its nature ancillary merely to that in the country of the domicile, because 'the final distribution of his effects among his heirs or distributees is to be decided by the law of his domicile.' This reason wholly fails in its application to this state, and the doctrine built on it is entirely subverted by our statute, declaring that personal property situated in this state shall descend and be distributed according to the laws of this state, notwithstanding the domicile of deceased may have been in another state. Code, section 1950. In this state, administration of the effects here of a deceased person, no matter where his domicile was, is independent of all other administrations, and to be conducted in all respects as if the decedent had been a citizen of this state when he died. Debts are to be paid according to the assets, and any surplus is to be distributed here. All creditors, no matter where residing, or where the debts were contracted, are entitled to prove their claims here, and proceed in our courts to enforce them, and to share in the assets here. There may be inconveniences, and sometimes hardships, resulting from this doctrine; but it plainly results from our system, as established by statutes, and we cannot shrink from declaring it, whatever may be the consequence."

So we find that our statutes put Mississippi under a rule different from the rule adopted by other states. The property to be distributed in this case may be termed "tangible personalty"—and as such it is located in this state and forms a part of the "Green Island Plantation." The leasehold is a part of the soil of the state held in trust by the state for the purpose of education. This estate is assessed on the land rolls; the state may not sell the trees growing on the land without the consent of the lessee; the lessee may destroy all of the timber and dispose of same, if it be necessary to good husbandry. The property owned by Mrs. Neblett, while a chattel real, has many qualities not applicable to ordinary leaseholds. Finding a lapsed legacy according to our statute, what rule should be followed in distributing the estate of the intestate, and, particularly, the leasehold in the sixteenth section?

We have reached the conclusion that the statutes of this state control the disposition of this property, and that the chancellor erred in refusing to partite same among the heirs at law of deceased.

Reversed and remanded.

GULF & S. I. R. Co. v. MITCHELL.

[73 South. 577, Division A.]

1. *COSTS. Jury tax. Statutes.*

A jury tax of three dollars is a part of the cost of a case under Code 1906, section 700, so providing.

2. *COST. Liability of successful party. Jury tax. Statutes.*

Under Code 1906, section 954, making a successful defendant liable for all cost accrued at his instance, and not paid or collected from the other party where no property of plaintiff could be found,

a successful defendant is liable for the jury tax of three dollars imposed by section 700 of the Code, since such tax is only imposed where a plea is filed and the defendant by his affirmative act in filing a plea causes the cost to accrue.

APPEAL from the circuit court of Covington county.

HON. W. H. HUGHES, Judge.

Suit by Ralph Mitchell against the Gulf & Ship Island Railroad Company. Judgment for defendant was duly entered and execution against plaintiff for the cost was returned *nulla bona*, whereupon execution was issued against defendant for the cost accruing at his instance. From an adverse decision against defendant on its motion to retax the cost it appeals.

The facts are fully stated in the opinion of the court.

Mayes, Wells, May & Sanders, for appellant.

W. U. Corley, for appellee.

SYKES, J., delivered the opinion of the court.

The appellee, Ralph Mitchell, brought suit against the appellant, Gulf & Ship Island Railroad Company in the circuit court of Covington county, and upon a trial of same the jury returned a verdict in favor of the defendant, whereupon judgment was duly entered by the court in favor of the defendant. Execution against the plaintiff for the costs was issued, and a return of *nulla bona* or "no property" was made on same, whereupon execution was issued against the successful defendant railroad company for the costs accruing at its instance.

This cost bill included an item of three dollars jury tax. The railroad made a motion to retax the costs, tendering into court all other items of cost except the three dollars jury tax, and contending that it was not liable for the said jury tax. The only question, therefore, for decision before this court is whether or not a successful defendant, after a jury trial, when

execution has been issued and returned "no property," against the plaintiff, is liable for this jury tax of three dollars. Section 954, Code of 1906, provides as follows:

Successful Party Liable for Certain Costs.— All costs accrued at the instance of the successful defendant in a suit, which cannot be collected out of the other party, may be collected from such defendant; and after return of 'no property' on execution against a plaintiff or complainant against whom costs were adjudged, execution may be issued against the successful defendant for all costs accrued at his instance and not paid or collected from the other party. A successful plaintiff or complainant shall be liable for all the costs of the case." accrued at his instance which cannot be collected from the defendants; and after return of 'no property' on execution against the defendant against whom costs were adjudged, execution may be issued against the successful plaintiff or complainant for all the costs of the case accrued at his instance not paid or collected from the defendant; and an unsuccessful plaintiff or complainant shall be liable for all costs of the case."

The above section makes the successful defendant liable for "all costs accrued at his instance and not paid or collected from the other party." Section 700, Code of 1906, reads as follows:

"Jury Tax Imposed, and How Collected.— A jury tax of three dollars is imposed on each original suit in the circuit court in which a plea is filed, and on every issue therein tried separately by a jury, and a tax of two dollars on each case transferred or appealed thereto, to constitute a fund for the payment of jurors, and to be collected by the clerk or sheriff as costs. The clerk shall be liable on his official bond for any failure to charge, receive, or issue execution for the jury tax; and the sheriff shall likewise be liable for a failure to collect or to pay the same to the county treasurer; and they may be fined as for a contempt therefor not more than one hundred dollars,"

The question then to be decided by this court resolves itself into this, viz.: Whether or not a jury tax of three dollars is a part of the costs of the case; and, second, if it is, then whether or not in this case this cost accrued at the instance of the defendant. Section 700, above quoted, provides that this jury tax is to be collected by the clerk or sheriff as costs. This section of the Code does not say that this jury tax is to be collected in the same manner as the costs are collected, but says it is to be collected as costs, which is equivalent to saying that it is to be collected as a part or parcel of the costs. This, in effect, makes it an item or part of the costs, just as the fees of the clerk, sheriff, and witnesses constitute a part of the costs. The supreme court of North Carolina, in construing statutes somewhat similar to ours, held this jury tax to be a part of the costs:

“‘On every indictment or civil suit . . . the parties convicted or cast shall pay a tax of one dollar, and in every suit in equity, a tax of two dollars.’ Rev. Code ch. 28, par. 4. By the same statute, ‘all fines, amercements, forfeitures and taxes on suits,’ are appropriated for the purpose of defraying the costs of state prosecutions, and the contingent expenses of the county. And it is made the duty of the clerk to report all such taxes, fines, forfeitures and amercements, and to account and pay them over to the proper officer. Under this statute the clerk collected the amount of taxes on civil suits reported, and failed to account for or pay it over.

“The defendant, who is surety for the clerk on his official bond, objects to paying the taxes on civil suits collected by the clerk: (1) Because the statute under which he collected them had been repealed, so that he did not collect them by virtue or under color of his office, or by authority of law. The foundation for their defense is the general revenue act of 1858-59, which repeals all taxes not therein imposed; and, this being a

tax on suits, it is repealed. This defense will not avail the defendant, because the tax on suits is not the kind of taxes embraced in that revenue act. Indeed it is not a tax at all in the sense that public taxes are understood. It is a part of the bill of costs taxed by the clerk to be paid by the unsuccessful party in every suit to pay the expenses of the court, the aid of which he has wrongfully invoked at the public expense. The fact that it is called a tax makes no difference. 'Tax' is a familiar and appropriate term in judicial proceedings. The fees of clerks, sheriffs, witnesses, referees, lawyers, are all taxes upon the losing party, and are 'taxed' by the clerk as the costs. The court orders the costs to be 'taxed' by the clerk, and to be paid as taxed. A motion to retax a bill of costs is common. The statute directs costs to be taxed by the clerk. 'The prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements to be taxed according to law.' Bat. Rev. ch. 17, par. 287. So an attorney's fee is taxed, and if an attorney take a larger 'tax fee' than allowed by law, he shall be indicted, etc. In the very case before us his honor directed the plaintiff to pay the costs to be 'taxed by the clerk.' And one of the definitions of 'tax' in Webster is: 'To assess, fix, or determine judicially, as the amount of costs on action in court; as the court taxes bills of costs.' We are of the opinion that the revenue act of 1858-59, or any like act, does not embrace the tax in question on suits, unless specially mentioned." *Elijah Hewlett v. Henry Nutt*, 79 N. C. 263.

In speaking of a statutory jury tax, the supreme court of Maine, in the case of *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169, has the following to say:

"The plaintiff, as a preliminary to a trial by jury, has always been held to pay the customary jury fee. If on the trial he succeeds, the amount paid is an item of costs, which the law imposes upon the defendant. By the act under consideration, the defendant, desiring a

jury trial, must pay the fee. But the amount thus paid is a charge to be taxed in his bill of costs in case of his success. If unsuccessful, the defendant has only paid what, in such case, the law would compel him to pay."

As to the second proposition advanced by the appellant, viz. that this three dollar jury tax did not accrue at its instance, section 700 of the Code provides that this jury tax is imposed on every suit in which a plea is filed. The tax does not accrue until the filing of the plea by the defendant. If the defendant fail to file a plea, then no jury tax is incurred. It is the affirmative act of the defendant in filing its plea that causes the imposition of this jury tax. This cost then of three dollars accrues at the instance of the defendant, caused by the filing of its plea. The appellant is therefore liable for the jury tax.

Affirmed.

SOUTHERN STATES FIRE INS. CO. ET AL. v. HAND-JORDAN CO.

[73 North. 578, Division A.]

1. INSURANCE. *Casualty insurance. Construction of policy. Defenses of suit. "Immediate notice."*

Under an employer's liability insurance policy, which provided that the insurer would at its own expense investigate all accidents and defend all suits of which notices were given to it and that immediate notice of any accident and of any suit resulting therefrom should be forwarded to it, where insured failed to give "immediate notice" of the accident, which means notice within a reasonable time under all the facts and circumstances but did give immediate notice of an intended suit against it about sixty days after the accident, which enabled the insurer to investigate the claim, in such case it was the insurer's duty to defend the suit at its own expense and when it failed to do so, it was the duty of the insured to defend the suit at the expense of the insurer.

2. INSURANCE. Casualty insurance. Action by insured. Reinsurance.

Where an insurance company contracted with another insurance company whereby it reinsured such other company, which had issued an employers' liability policy to plaintiff for all of its outstanding liabilities, and agreed that any liability or expense under the former company's policies would be assumed and paid, such a contract was more than a contract of reinsurance and was made for the benefit of the insured and the insurance company which did not issue the policy directly to the insured, was also liable to him.

3. INSURANCE. Casualty insurance. Defense of suit. Liability.

Under an employer's liability insurance policy requiring the insurer to defend any suit of which notice should be given, excepting liability for any expense incurred by insured not specifically authorized by the insurer in writing, where the insurer declined to defend a suit after notice, it was liable for the expenses incurred by the insured in his successful defense of such suit.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Suit by the Hand-Jordan Company against the Southern State Fire Insurance Company and the Florida Fire & Casualty Company. From a judgment for plaintiff, defendant appeals.

U. B. Parker and J. F. Robinson, for appellants.

Tally & Mayson, for appellee.

SYKES, J., delivered the opinion of the court.

In May, 1912, the Southern States Fire Insurance Company for a valuable consideration issued to the appellee company an employer's liability insurance policy for a period of one year. Under the terms of this policy the appellant company agreed to and did insure the appellee against loss— "imposed by law upon assured for damages on account of bodily injury, including death resulting therefrom, accidentally suffered by any employee or officer or employees and officers of

112 Miss.]

Opinion of the court.

the assured while upon the premises or upon the sidewalks or other way immediately adjacent thereto."

The limit of insurance in this policy was five thousand dollars on an accident to one person and ten thousand dollars on accident to more than one. The policy also contained the following provisions:

"In addition to these limits, however, the company will, at its own cost (court costs being considered part thereof), investigate all accidents and defend all suits, even if groundless, of which notices are given to it as hereinafter required, unless the company shall elect to settle the same."

"Immediate notice of any accident and of any suit resulting therefrom, with every summons or other process, must be forwarded to the home office of the company, or to its authorized representative.

"The company is not responsible for any settlements made or any expenses incurred by the assured, unless such settlements or expenditures are first specifically authorized in writing by the company, except that the assured may provide at the time of the accident at the expense of the company, such immediate surgical relief as is imperative."

A short time thereafter the Southern States Fire Insurance Company entered into a contract with the other appellant, the Florida Fire & Casualty Company, whereby the Florida Company reinsured the Southern Company for all of its outstanding liabilities, and also agreed as follows:

"For the consideration aforesaid, it is hereby further agreed by and between the parties hereto that any loss, liability, or expense under the terms or on account of said policies now existing, or occurring hereafter under the policies issued by the Southern States Fire & Casualty Insurance Company to twelve o'clock noon of June 15, 1912, according to its policy registers and other records, the Florida Fire & Casualty Insurance Company of Jacksonville, Florida, agrees and obligates

itself to assume and pay, and in the event there shall arise any dispute or difference over the amount of damage, loss, or expense, or should any litigation arise by reason thereof where the Southern States Fire & Casualty Insurance Company shall be called upon to answer for any loss, damage, or expense, the said Florida Fire & Casualty Insurance Company agrees to indemnify and hold harmless the said Southern States Fire & Casualty Insurance Company and to pay any and all expenses, losses, or damages that occur to the said Southern States Fire & Casualty Insurance Company by reason thereof."

On the 13th day of December, 1912, while this indemnity policy was in full force and effect, and after the contract was made between the two appellants, one Louis Purvis, an employee of the appellee company, claimed to have been injured. He was sent to a physician by the appellee company, and later on by it was given his full wages as compensation for the time he was disabled from duty. No report of this injury was made to either of the appellant companies at that time. Later on Purvis placed his claim against the appellee company for personal injuries in the hands of attorneys for settlement or suit, and the appellee company was given notice by these attorneys to this effect. Immediately upon this notice from the attorneys, which was about sixty days after the happening of the accident, the appellee company notified the Southern Company of the injury. The Southern company immediately notified the Florida Company of the injury, and an agent of the latter, with an attorney, went to Purvis and made an investigation of the facts relating thereto. Before his investigation was made suit had been instituted against the appellee company by Purvis. Notice of this suit was immediately given to the Southern Company by the appellee. After this investigation by the agents of the appellant companies these companies declined to defend the lawsuit, claiming that appellee had breached that

provision of th contract which required that immediate notice be given to the appellant company of the happening of any accident. The appellee was therefore compelled to employ attorneys to properly defend the suit. The suit was duly tried and verdict and judgment rendered in favor of the defendant company. The attorneys' fees and other necessary expenditures of the appellee in defending the suit of Purvis amounted to nine hundred eighty-one dollars and five cents. The present suit was filed in the circuit court of Lamar county against these two defendants (appellants here) to recover the above amount of money expended by the appellee in accordance with that provision of the policy above quoted which in effect provides that the insurance company will at its own instance investigate all accidents and defend all suits on which notice is given to them as hereinafter required. It is unnecessary for us to set out in detail the pleadings in the case. The appellant companies denied liability, first, on the ground that the appellee company had failed to give them immediate notice of the happening of the accident, and that this failure absolved them from any liability whatever. The Florida Company, before the pleas were filed, made a motion to dismiss the case as to it because it had only reinsured the Southern Company and was not directly liable to the appellee here. It was also contended that neither of the appellants was liable in this case, because the expenditures of money in defending the suit of Purvis were not specifically authorized in writing as provided by a clause in the insurance policy above quoted.

The principal contention of the appellant companies in this case is that the failure of the appellee company to give them immediate notice of the accident absolutely absolves them from all liability in this case. They cite a vast number of authorities to the effect that, where as a condition precedent to a recovery in a policy of insurance it is required that immediate notice of

the happening of the accident be given to the insurance company, then no recovery can be had unless this notice is given; that the phrase "immediate notice" simply means notice given within a reasonable time under all the facts and circumstances of the case. They further cite various cases showing that periods of time varying from fifteen to twenty-five and thirty days are unreasonable delays as a matter of law for which no recovery could be had. These cases, however, are not in point with the case at bar, for the reason that in the policy here in question the loss or indemnity provides absolutely for the payment up to the limits named for losses caused by accidents to employees. The clauses with reference to the notice apply as conditions precedent to cases for the recovery of damages and expenses: First, incident to the investigation of an accident; second, incident to the investigation and defense of a lawsuit. The policy provides that:

"Immediate notice of any accident and of any suit relating therefrom . . . must be forwarded to the home office of the company."

Another section provides that:

The "company will at its own expense investigate all accidents and defend all suits of which notices are given to it."

This clause of the policy expressly makes the company liable: First, for all expenses incurred in investigating an accident of which it was given immediate notice and which it declined to investigate; and, second, makes it liable for all expenses incurred in defending all suits of which immediate notice was given to the company. The case at bar is a suit for expenses incurred in defending the suit of an employee. Immediate notice was given to the company as soon as this suit was brought. Therefore, it was the duty of the company under this policy to have defended the suit at its own expense. When it failed to so defend this suit then it was the duty of the appellee to do so at the expense of the insurance com-

pany. In the case of the *Hope Spoke Co. v. Maryland Co.*, 102 Ark. 1, 143 S. W. 85, 38 L. R. A. (N. S.) 62, Ann. Cas. 1914A, 268, which was a suit on a policy of indemnity insurance containing the identical clauses in question here, the supreme court of Arkansas in a well-considered opinion fully discusses the questions herein involved. After that case was decided, and in response to a petition for a rehearing, Chief Justice McCULLOCH, of that court, in construing the provision requiring notice, has the following to say:

"The provision for notice refers to two subjects, notice of the accident and notice of suit. The contract makes the right to recover costs and expenses of defending a suit depend as a condition precedent on the giving of notice of suit. It is undisputed in this case that notice of suit was promptly given, therefore the right to recover costs and expenses of suit is established."

The above case is cited and quoted from with approval in the case of *Employers' Liability Life Insurance Co. v. Jones County Lumber Co.*, 72 So. 152. We therefore conclude that the notice of the suit was immediately given as required by the policy.

It is next contended by the appellant that the motion to dismiss as to the Florida Fire & Casualty Company should have been sustained because this was only a contract of reinsurance, and that this company did not become liable to the Hand-Jordan Company under said policy. The policy is more than a policy of reinsurance, because it expressly provides that the Florida Company agree and obligates itself to assume and pay any loss or liability or expense under the terms of the existing policies of the Southern Company. This contract between the two insurance companies is similar to the one discussed in the case of *Barnes v. Fire Insurance Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438. In that case the court has the following to say:

"It will be conceded that the agreement between the two companies set out in the answer is not merely a contract of reinsurance, but also to pay, and assume the payment of, losses of parties indemnified by policies issued by the defendant company reinsured. Reinsurance is a mere contract of indemnity, in which an insurer reinsures risks in another company. In such a contract the policy holders have no concern, are not the parties for whose benefit the contract of reinsurance is made, and they cannot, therefore, sue thereon. But the agreement alleged in this case is not a mere reinsurance of the risks by the reinsurer, but it embraces also an express agreement to assume and pay losses of the policy holder, and is therefore an agreement upon which he is entitled to maintain an action directly against the reinsurer; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50 (27 N. W. 414). 57 Am. Rep. 249."

This case is similar to that of *Ruohs v. Traders' Fire Insurance Co.*, 111 Tenn. 405, 78 S. W. 85, 102 Am. St. Rep. 790. In that case, after going very fully into the authorities, the supreme court of Tennessee held that the contract between the two insurance companies was made for the benefit of the assured, and that the insurance company which did not issue the policy directly to the insured was also directly liable to him.

It is next insisted by the appellants that they are not liable in this case because they did not authorize in writing the expenses incurred in defending the lawsuit as is provided in that clause of the policy above set out in full. There is nothing whatever in this contention. A complete answer to it is the following quotation from the opinion of the court in the case of the *St. Louis Dressed Beef & Packing Co. v. Maryland Casualty Co.*, 201 U. S. 173, 26 Sup. Ct. 400, 50 L. Ed. 712:

"The defendant by its abdication put the plaintiff in its place with all its rights. . . . The substance of the promise is to pay a loss which the plaintiff shall have been compelled to pay, after such precautions and

with such safeguards as the defendant may insist upon. It saw fit to insist upon none. . . . If the defendant kept its contract, it would defend the suit, and the plaintiff would have no duties. If it refused to do as it has promised, we cannot think that it was entitled to complain that the plaintiff did not do it when the interest of both was the other way."

In the case at bar the Purvis suit was not only defended by the appellee company, but was successfully defended by them. We find no reversible error committed in the trial of this cause in the court below, and the judgment of the lower court is hereby affirmed.

Affirmed.

MULFORD v. ROBERTS SHERIFF ET AL.

[73 South. 609, Division B.]

SHERIFFS AND CONSTABLES. Failure to levy execution. Liability.

Where appellant procured a judgment against his debtor and had an execution issued and placed in the hands of the sheriff with directions to levy on a certain warrant issued by the board of supervisors to the execution debtor, which warrant was then in the custody of the chancery clerk and the sheriff delivered the execution to an unsworn deputy, who went to the office of the chancery clerk and there found the warrant, but did not take the same into his possession as required by Code 1906, section 3964, but pinned the execution to the warrant and before the sheriff got possession of the warrant it was delivered to a third party under an assignment and in a suit between the sheriff and such assignee the warrant was awarded to the assignee. In such case there was a failure on the part of the sheriff to levy the execution and the judgment creditor was entitled to damages against him for his neglect.

APPEAL from the circuit court of Lawrence county.
HON. A. E. WEATHERSBY, Judge.

Suit by J. F. Mulford against L. T. Roberts, sheriff, and others. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

C. E. Gibson, for appellant.

It will be seen from a review of all the testimony in the case that there was no levy at all, all the witnesses say, in fact it is so stated in the returns of the sheriff, that the execution was pinned to the warrant. Can it be said that this constitutes a levy? It could not even be held to be a constructive levy, for there would be nothing to give a trespasser warning. There was no sign of warning in the execution, because there was nothing to show that it had ever been in the sheriff's hands. It, as a matter of course, indicated nothing.

A levy is where an officer seizes and possesses himself with chattels under a writ in such a manner as to enable him to maintain an action of trespass or replevin against a wrongful taker. 84 Wis. 80, 54 N. W. 18-20; 200 L. R. A. 267; 36 Am. St. Rep. 907.

The law presumes that the property levied on by the sheriff to be taken in the hands of the sheriff. 45 Miss. 419.

A levy on personal property is only made by the taking of the property into the possession of the sheriff. Just to make a return "I have leveyed upon the property suggested by writ of execution" but failed to take same into his possession has not made a levy. 10 S. & M. 36.

The omission to levy an execution is a breach of the sheriff's bond. 5 H. 434; 11 S. & M. 219, 49 Am. Dec. 53. The sheriff says that the property was pointed out to him (tr. p. 8.) In the case of *Redus et al. v. The State to use of W. S. Browdry*, it was held that if the

plaintiff points out the property in the defendant's possession, it is *prima facie* subject to execution; and if the sheriff fails to demand a bond of indemnity, and does not levy, he assumes the burden of proving that the property belongs to a third person, or is exempt."

The sole and only question in this case is, did the sheriff omit to levy the execution, or did his acts in undertaking to levy, cause the plaintiff to suffer thereby, if so, then his bond is liable. In 17 Cyc. 1085, the general rule levying upon personal property is stated as follows:

"The rule is well settled that to constitute a valid levy upon personal property the property must be within the power and control of the officer when the levy is made and he must take it into his possession within a reasonable time thereafter, and in such an open public, and unequivocal manner as to apprise everybody that it has been taken in execution. In some of the cases the rule has been thus stated: 'The officer must deal with the property in such manner, in order to constitute a valid levy, as would, without the protection of the execution, make him a trespasser.' "

The rule as stated by the Missouri court in the case of *Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 378 "the word levy as defined by our statute means actual seizure, that is, the officer must take actual possession of the goods, and this language would seem to exclude all idea of a constructive possession."

In the case of *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206, it was held, "Where no delivery bond is executed, the officer who levies on personal property must, to affect the rights of third persons, take the property into his possession."

Section 3964 of the Code of 1906 under the head of process, reads as follows: When on personalty—"If the levy be upon personal property the officer shall take the same into his possession and dispose of it according to law."

By reference to the return it will be seen that the sheriff said that he had levied upon the said warrant, etc., and that he then and there notified the chancery clerk that he had done so, and then by the further and second returns the said sheriff recites the fact that he had levied upon the warrant in question by pinning the execution to the warrant. Is this such protection as the officers of the law are due the citizens who look to them for the protection of their rights? The sheriff could have taken the warrant out, as it was shown that he had done others, and if it had not been registered, he could have had it registered. There are many ways by which the plaintiff in execution could have been protected, and this by the exercise of only ordinary caution and judgment.

Luther E. Grice, for appellee.

There is only one complaint that appellant can make against the sheriff, and that is that the latter did not take the execution and go to the clerk's office and there remain, day and night, keeping one eye upon the clerk and the other upon the warrant book, until something "turned up." This complaint, we submit, has no foundation either in reason or in law. Appellant might as well say that the sheriff could be required to keep vigil over a cow, waiting for the birth of a calf, in order to levy on the calf. We decide that the judgment of the lower court should be affirmed.

Patterson & McGehee, for appellee.

We invite the court's attention to the main disclosures made by the record to the effect that at the time the execution in question was placed in the hands of the sheriff, the warrant in controversy had not been signed by the clerk and had not been registered as required by law. The warrant had not been signed or registered when the deputy sheriff went to the clerk's office to make his levy. If he had taken it out in its un-

signed and unregistered condition it would not have been worth anything—in fact it was not then a warrant, and had no value. He pinned his execution to the paper, which was then payable to the judgment debtor for a definite amount, and which said execution would have become notice not only to the clerk, but to all parties that the sheriff was claiming it under the execution as soon as the same should have been signed and registered. The evidence shows that it was not in fact issued. The evidence also shows that the warrant was taken under a prior assignment, and thereby shows that the action of the sheriff did not damage the appellant. Referring to the authorities cited by counsel for appellant to the effect that a levy on personal property consists in the officer taking the property into his possession, we respectfully submit that to constitute taking property into possession it is not necessary that the property be removed from the place at which the officer finds it. For instance, suppose the property in question had been a stack of lumber, then the levy would have been sufficient if the officer had attached sufficient notice thereto to apprise the public that he was taking it under execution, and in the case at bar the notice or paper affixed to the warrant was ample notice in that behalf, and there was no greater reason for requiring the officer in order to have possession of it than there would be to require him to take the lumber there in case of a levy on lumber.

We respectfully submit that the record fails to show in this case that the sheriff was guilty of any breach of official duty such as to make him answerable in damages to the appellant.

COOK, P. J., delivered the opinion of the court.

The appellant procured a judgment in the justice of the peace court against one S. H. Deen, had an execution issued thereon, and placed same in the hands

of appellee L. T. Roberts, who was the sheriff of the county. The sheriff was directed to levy on a certain warrant issued by the board of supervisors to the execution debtor, which warrant was then in the custody of the chancery clerk. The sheriff delivered the execution to a deputy. The deputy went to the office of the chancery clerk, and there found the warrant, but did not take same into his possession. The deputy made the following return on the execution, viz.:

"Executed the within writ by levying upon a certain county warrant No. 553, issued on July 5, 1912, drawn in favor of S. H. Deen for the sum of two hundred sixty-five dollars, as the property of said S. H. Deen, which said warrant when levied upon was in the possession of the chancery clerk of Lawrence county, Miss., and said chancery clerk was then and there notified that I had levied upon said warrant by virtue of the within execution, whereupon the said chancery clerk took this execution and pinned it to said warrant so levied upon. This 5th day of July, 1912. L. T. Roberts, Sheriff, by W. T. Holmes, D. S."

Thereafter, and on the return day of the execution, the sheriff made this additional return on the execution, viz.:

"I have further executed the within writ by going in person on the 6th day of July, 1912, to the office of the chancery clerk of Lawrence county, Miss., and levying upon and taking into my possession a certain county warrant No. 533, issued on the 5th day of July, 1912, drawn in favor of S. H. Deen, for the sum of two hundred sixty-five dollars, and of the value of two hundred sixty-five dollars, as the property of S. H. Deen, and by then and there declaring to the said chancery clerk in whose official custody I found said warrant that I wished to take out all warrants that I had in his office and take same into my possession, meaning to take this one under this writ, and after having taken the warrants into my possession, I left them there to be regis-

tered as required by law to be done, and I again fastened this writ of execution to said warrant as a warning to all parties that it had been levied upon and taken into my possession, and the said chancery clerk well knew that this had been done, and I also notified the said S. H. Deen I had levied upon the said warrant under this writ, at which time I was informed by the said Deen that Mr. John H. Arrington had some interest in said warrant. I also notified the said Arrington that I had levied upon the said warrant under this writ, who then and there stated that he would file claimant's affidavit for the same, and after a short time I returned to the said chancery clerk's office, where I had left the warrant to be registered, and, going to the place where I had left the same, I found that it had been removed by the said S. H. Deen and Arrington, as I was informed, and I immediately telephoned the Bank of Monticello and the said Arrington that I had levied upon the said warrant, and requested that the warrant be returned to me, which request was refused, whereupon, on the——day of July, I caused a writ of replevin to be issued for the said warrant and served upon the said bank, and the said bank thereupon gave bond as provided by law for the delivery of said warrant or its value to the circuit court of Lawrence county on the first Monday of August, 1912, when and where said replevin writ was made returnable, copy of which said bond, duly certified to, is herewith returned as a part hereof. Given under my hands this the 27th day of July, 1912. L. T. Roberts, Sheriff of Lawrence county."

Thereafter an additional and final return was made as follows:

"The Estate of Mississippi, Lawrence County. Now, for further and final returns hereon, I would show that on the 9th day of August, 1912, the case of Roberts, as sheriff, against the Bank of Monticello, filed in the circuit court of this county, as heretofore reported, and,

the same having been presented to the court, the court found for the defendant therein and that the Bank of Monticello was entitled to hold the property in question as against the said plaintiff, Roberts. I therefore have no property or money to return into this court under said execution and levy, and asked to be discharged with my reasonable cost. L. T. Roberts, Sheriff of Lawrence County."

The evidence taken at the trial shows that there was an attempt to levy the execution by pinning the same to the warrant and by pinning both to the stub in the warrant. It is claimed that the chancery clerk asked that the warrant be left with him for registration; but the chancery clerk denies this.

Before the sheriff got the warrant in his possession another person got possession of the warrant by assignment, and what the sheriff then did to get the warrant into his possession is shown by the return. Briefly stated, the sheriff never took the warrant into his possession and under his control, but after he had made an abortive attempt to levy the execution, the warrant was delivered to the Bank of Monticello, and thereupon the litigation to gain possession was begun and resulted in his failure to get the warrant. It was the duty of the sheriff to take into his possession the warrant pointed out to him, and the question is: Did he do it?

The sheriff, testifying as a witness, in response to a question as to whether he did take possession of the warrant, said that he attempted to take possession, but he did not quite succeed in his attempt. There is another notable feature of this record; the deputy (?) appointed to serve the execution was never sworn in as such, and was not appointed in writing to serve the process. The law prescribes the method for levying process upon personal property. Section 3964, Code of 1906. The sheriff in this case did not pursue the way marked out by the statute, and, never having taken into his possession the property in question, he had no right to the posses-

sion of same, and his efforts to secure possession by suit were, of course, futile. The rights of the judgment creditor may not be determined by an action of replevin instituted by the sheriff against strangers to the record, especially, when it appears that the sheriff did not take into his possession the property involved.

The course adopted by the sheriff was perilous, as the result demonstrates. It was easy for him to have put the burden on the claimants, but he assumed the burden himself, failed in his efforts to support it, and he must suffer the consequences.

As we read this record, the learned circuit judge erred in not directing the jury to find for the plaintiff, for it is plain that the sheriff did not travel the blazed way, and the execution creditor was without remedy for his neglect, save by this suit. Instead of directing a verdict for plaintiff, the court took the opposite course, by directing a verdict for defendant.

The relative rights of the plaintiff in execution and the claimants of the warrant could not be adjudicated in this suit, for the reason that there had been no legal levy of the execution.

Reversed and remanded.

PHILP v. HICKS.

[73 South. 610—76. South. 931, Division B.]

1. LIMITATION OF ACTIONS. *What law governs.*

The statute of limitations of this state controls where suit is brought in this state upon a promissory note made in Ontario, Canada.

2. LIMITATION OF ACTIONS. *Acknowledgment of debt.*

In order to take a case out of the statute of limitations, an express acknowledgment of the debt as a debt due at that time, or an express promise to pay it, is necessary.

Brief for appellant.

[112 Miss.]

3. LIMITATION OF ACTIONS. *Acknowledgment of debt. Admission to procure compromises.*

An admission contained in a writing the purpose of which is to procure a compromise of a barred demand, does not operate as an acknowledgment of the debt so as to remove the bar of the statute.

4. LIMITATION OF ACTIONS. *Acknowledgment of debt. Certainty and definiteness.*

Where a debtor whose debt had become barred by limitation wrote a letter stating that the note had been brought to his attention and had thought it had been paid, and continuing "but as I noted that the note has not been stamped with any cancellation stamp same certainly must still be unpaid" and offering to settle for a lump sum such letter was not sufficient to remove the bar of the statute, since there was no express and definite acknowledgment of the debt nor any express promise to pay it.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by Dr. A. A. Hicks against R. M. Philp on suggestion of error.

Wiley P. Harris, for appellant.

At the outset, the court's attention is especially called to the consideration of the following facts: 1st, that this cause of action accrued in a foreign country; 2nd, that the defendant, Philp, was in that country, and subject to suit, fully ten months after the cause of action accrued; 3rd, that the right of action upon the note in question was barred by the laws of that country more than three and a half years before the filing of this suit. Chapter 75, Revised Statutes of Ontario. 4th, that the defendant was a citizen of this state when suit was brought. See plaintiff's declaration, p. 2 of record; therefore the laws of this state must govern, under the facts of this case; 5th, that under the laws of this state the note was barred three and a half years before the filing of this suit—nine and a half years having elapsed since the cause of action accrued. Revised Statutes of Ontario, chapter 75; *Wright v. Mordaunt*,

77 Miss. 537; *Davidson v. Morris*, 5 S. & M. (Miss.) 564; *Smith v. Moreland*, 12 S. & M. (Miss.) 663; *Crane v. French*, 38 Miss. 532.

With the authorities about evenly divided on the question as to the identity of the particular debt necessary to be contained in the writing, our court has gone to the extreme view, in requiring the writing to be precise and definite as to the particular debt and the amount due. *Trustees, etc. v. Gilman*, 55 Miss. 148; *Eckford v. Evans*, 56 Miss. 18; *Fletcher v. Gillan*, 62 Miss. 8; *Stevenson v. Morris*, 69 Miss. 232.

These decisions announce a rule which is far more exacting than that required by the weight of authority and clearly indicate that our court will not indulge a doubtful or uncertain acknowledgment as being sufficient evidence of a new or continuing contract to revive an outlawed demand.

The general rule as to the sufficiency of such an acknowledgment may be stated as follows: An acknowledgment in order to take a case out of the operation of the statute of limitations, must be an express, direct, unequivocal, unconditional admission that the obligation is a present, subsisting debt, for which the party making the acknowledgment is then liable and willing to pay. *Koop v. Cook*, 135 Pac. 317; *Hansen v. Towle*, 19 Kan. 273, at page 281; *Powell v. Petch*, 136 Pac. 55; *Connecticut T. & S. Co. v. Weade*, 172 N. Y. 497; *Hamilton v. Beaubin*, 142 Pac. 245; *Wolfe v. Flemings*, 23 N. C. 290; *Davidson v. Morris*, *supra*.

A writing which is no more consistent with the claim that an acknowledgment was intended, than with the claim that it was not, or if the expression leave no certain conclusion but at best a probable inference, which may affect different minds in different ways, it is not sufficient evidence to revive a cause of action previously barred. *Bell v. Morrison*, 1 Pet. U. S. 351; *Heyton v. Cooper*, 65 Kan. 359; *Weaver v. Weaver*,

54 Pa. 152; *Chambers v. Garland* 3 Greens Rpts. (Iowa) 322.

An admission contained in a writing, the purpose of which is to procure a compromise of a barred demand, does not operate as an acknowledgment of the debt so as to remove the statutory bar. *Pools' ex'r v. Rolfe et al.*, 23 Ala. 701; *Weston v. Hodgkins*, 136 Mass. 326; *Chambers v. Garland*, 3 Greens Rpts. (Iowa), 322; *Atwood v. Cobrun*, 4 N. H. 315; *Cross v. Conner*, 14 Vt. 394; *Connecticut T. & S. Co. v. Weade*, 172 N. Y. 497; *Wolfe v. Flemings*, 23 N. C. 290; *Bates Adm. v. Bates*, 33 Ala. 102; *Mumford v. Freeman*, 8 Metcalf 432.

As authorities in support of appellant's contention in this case, and to be considered along with those herein cited, I refer the court to the following: *Moore v. Bank of Columbia*, 8 Law Ed. U. S. Rpts. 329; *Bell v. Rowland*, 3 Am. Dec. 729; *Holladay v. Weeks*, 127 Mich. 363; *Marcum v. Terry*, 142 S. W. 209; *Martin & Co. v. Edwards*, 55 Iowa 374; *Wood v. Merriett*, 71 Pac. 579; *Kelly v. Strouse*, 43 S. E. 280; *Morgan v. Walton*, 4 Barr. (Pa.) 321; *Shepherd v. Thompson*, 30 Law Ed. U. S. Rpts. 1156. *Trustees, etc. v. Gilman*, 55 Miss. 148; *Allen v. Hillman*, 69 Miss. 225.

The true principal upon which statutes of limitations are founded, is to compel the settlement of claims, within a reasonable period after their origin, while evidence is fresh in the minds of the parties and witnesses, and not upon the presumption of payment or releases arising from the lapse of time. "Wood on Limitations, sec. 5; *Shepherd v. Thompson*, 30 Law Ed. U. S. Rep. 1156; *Bell v. Morrison*, 1 Pet. U. S. Rep. 351. As stated in the case of *Ayers v. Richardson*, *supra*; "The statute presupposes the debt to have been due, and that there is no evidence that it has been paid. It would be absurd to say that a new promise shall be implied by the bare admission of the party of what the law supposes to be true."

Fulton Thompson and *R. H. & J. H. Thompson*, for appellee.

A perfect answer to appellant's pleas of the statute of limitations. The written acknowledgment of the debt.

It being an admitted fact that defendant left Ontario less than ten months after the maturity of the note sued upon, and before an action on the note there would have been barred, no defense can be based on the laws of that province. The sole purpose and effect of our statute, Code 1806, sec. 3114, by which alone the statute of limitations of another state or country, can be pleaded in this state, are to give a defendant sued here the benefit of a bar complete elsewhere. *Wright v. Mor-dant*, 77 Miss. 537, 27 So. Rep. 640.

The cause of action on the note not having been barred by the laws of Ontario when defendant left that province, the laws thereof do not bar the suit in this state, and this being true, we have only to inquire if the written acknowledgment of the debt, about to be mentioned, prevents the cause of action from being barred under the statutes of this state.

The claim of distinguished counsel for appellant that the acknowledgment of the debt is ineffectual because of the enquiry in the letter, "what will you take for a settlement in a lump sum?", is without merit, and for two reasons:-

FIRST: The acknowledgment of the debt was the admission of a particular fact, independent of any offer to pay that may be implied from the enquiry. There is no statement in the letter containing the acknowledgment that the same was confidential, nor that it was made or written without prejudice. It contains no offer of a sum of money to buy peace. There was no treaty pending between the parties when the letter was written for a compromise, but the same was voluntarily written by defendant; and the implied offer to pay was wholly voluntary and unsolicited. Two deci-

sions of this court are controlling. *Grubbs v. Nye*, 13 Smed. & M. (21 Miss.), 443; *Garner v. Myrick*, 30 Miss. 448.

The acknowledgment contained in the letter is both separable and separated from the enquiry therein written. 16 Cyc. 950, and notes; see, also, 25 Cyc. 1325, especially p. 1327; 1 Ency. of Evidence, 599 and notes.

The judgment should be affirmed, irrespective of the acknowledgment of the debt, because, as we have herein before shown, appellant did not make out a defense; he did not make it out either under the Ontario or Mississippi statute. *Smith-Frazier Boat Co. v. White*, *supra*.

Answering appellant's brief touching the acknowledgment of the debt, ingenious counsel for the appellant fails to give significance to the fact that our statute, Mississippi Code, 1906, sec. 3118, relating to acknowledgments and new promises, embraces two separate things, acknowledgments and new promises. Counsel very ingenuously and ably contends that an express assumption of the debt is an essential element of an acknowledgment of it. This is to confuse an acknowledgment with a new promise. It may, perhaps, be said that a new promise failing to evidence an intent on the part of the promisor to pay the old debt, is sufficient, because a sufficient new promise would necessarily evidence an intent to pay. The new promise of the statute is a promise to pay the old debt.

It is different, however, with an acknowledgment made by the statute, a complete and perfect answer to the statute of limitations. An intent to pay is not an essential of an acknowledgment of a debt. Would this court for one moment allow a promisor who had in writing fully and unequivocally acknowledged an old debt to testify that at the time he executed the written acknowledgment he had no intent to pay or that it was his intent not to pay? Surely not.

The authorities cited by opposing counsel are no doubt the decisions of courts of states wherein only a new promise will take a debt out of the statute of limitations. If our statute had omitted an acknowledgment of a debt and had provided only that a new promise was required to prevent the bar of limitation, an acknowledgment which in no way evidenced an intent to pay would probably be insufficient, for the reason that it would not be a good new promise. The Mississippi Cases, *Grubbs v. Nye* and *Garner v. Myrick*, herein before cited, are, we think conclusive of the case.

COOK, P. J., delivered the opinion of the court.

This case was affirmed on a former day of this term without opinion, and is again brought to our attention on suggestion of error.

Suit was begun in the court of a justice of the peace on the following promissory note:

"Chatham, Ont., Sept. 17th, 1904. Due Jan. 4. \$75.00. On 1st. Jan., 1905, after date I promise to pay to the order of A. A. Hicks at the Merchants' Bank of Canada here the sum of seventy-five dollars. Value received. R. M. Philp."

The justice of the peace rendered a judgment against the plaintiff, and an appeal was taken to the circuit court, where the finding was for the plaintiff and defendant appealed to this court. In the circuit court the record discloses that the case was tried by the judge without a jury. In addition to the note and indorsements thereon, the following letter, signed by defendant, was introduced in evidence:

"Jackson, Miss., Dec. 6, 1912. Dr. A. A. Hicks, Chatham, Ont.—Dear Sir: I received a call from atty. J. H. Thompson of this city, re a one hundred and twenty seven dollar debt which you hold against me. This acct. is a bit late in being presented, as I have been under the impression same had been paid long ago, but

as I noted that the note for seventy-five has not been stamped with any cancellation stamp, same certainly must still be unpaid.

"As I do not want you to lose any of this amount, what will you take for a settlement in a lump sum. .

"I will look for a reply from you within a few days and I trust that this matter will be closed up within a short while."

It will be noted that the note was due on January 1, 1905, and that this suit was begun on the 10th day of August, 1914, in the justice court.

It seems that plaintiff contended that the statutes of the province of Ontario, Canada, would control in determining whether or not the claim was barred by the statute of limitations, while the defendant claimed that the statutes of the forum are controlling.

We agree with the defendant that the statutes of this state furnish the rule, but we believe that this record shows that the claim was barred by the statutes of both jurisdictions, and that the action was barred here unless the letter written by the defendant removed the bar.

Our first impression was that the letter acknowledged the indebtedness; but, when the suggestion of error was filed, a more careful examination of the law books and a more thorough analysis of the letter caused us to seriously doubt the correctness of our former judgment, and we therefore asked counsel for appellees to file further briefs in response to the suggestion of error, but they declined to do so, believing as they did that they had exhausted the subject in their original brief, which is probably true. So, the question is: Was the letter written "to serve as an acknowledgment, or promise of a debt in order to prevent the bar of the statute?" *Allen v. Hillman*, 69 Miss. 225, 13 So. 871. Is the letter sufficiently precise and definite as to the debt and amount to have the effect under the established rule?

In the early days, our high court of errors and appeals definitely defined the purpose and policy of our statutes of limitation. It was held then that they were "acts of quiet and repose," and the court pointed out the fact that these acts were designed to discourage lawsuits, and said, "The law is created for the watchful and not for the negligent." *Davidson v. Morris*, 5 Smedes & M. 571.

In this case the court announced the rule to be "in order to take a case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at that time or an express promise to pay it." Tested by this time-honored rule, was it intended by the writer of the letter to expressly acknowledge the debt as due at the time?

An admission contained in a writing, the purpose of which is to procure a compromise of a barred demand, does not operate as an acknowledgment of the debt so as to remove the bar of the statute. *Pool's Ex'r v. Relfe*, 23 Ala. 701.

It is reasonably clear that Mr. Philp wrote the letter for the purpose of compromise. It is true that he said that the note must not have been paid. However, this is not all of the letter. The writer stated that he was under the impression that the note was paid long since, but since the note was not stamped paid he deduced that he may have been wrong in his impressions. It seems, therefore, if we assume that the writer was frank, he believed that the note had been paid, but, as it appeared that the note had not been stamped paid he could not claim that he had paid it. In other words, the evidence seemed to be against the correctness of his recollection. The courts of the several states have adopted different rules of construction for their statutes of limitation, but our court has uniformly held that, in order to remove the bar of the statute, the acknowledgment of the debt and the promise to pay must be definite and unequivocal.

We now believe that the letter relied on in this case does not come up to the mark, and must be taken as a frank letter from one friend to another expressing surprise that the note had not been paid, but admitting that the circumstances were against his recollection, and for this reason he inquired of his friend what it would take to settle the matter. Stated in another way, he admitted that the evidence warranted a compromise. There was no express and definite acknowledgment of the debt, and it is not claimed that there was an express promise to pay.

If we have correctly interpreted the writing, it seems to logically follow that the confessedly barred claim has not been acknowledged, and the learned circuit court was in error; and, also, that this court was in error when it affirmed the judgment of the trial court.

The suggestion of error is sustained, the judgment below is reversed, and the cause is dismissed.

Reversed and dismissed.

HATTEN ET AL. v. BOND ET AL.

[73 South. 612, Division A.]

1. COUNTIES. *Creation. Procedure. Registration of voters.*

Under Acts 1916, chapter 527, section 15, providing, that the registration books of the county of Harrison shall be the registration books for the purpose of the election to be held in the territory embraced in the county of Stone and that the polling places now established in the county of Harrison and embraced in Stone county shall be the voting places for the purpose of holding the election under section 3 of the act. This act was sufficient authority for the purpose of holding the election and the fact that section 15 of the act provides that qualified electors shall be registered ten days before said election, and that the commissioners, if they see proper, may establish other voting precincts,

and shall divide the territory into convenient voting precincts, which was not done, does not invalidate the election, as it was discretionary with the commissioners as to the establishing new precincts and to register a person ten days before the election. would not qualify him to vote.

2. COUNTRIES. *Creation. Procedure. Submission to popular vote.*

Under section 260 of the Constitution so providing, no new county can be formed unless a majority of the qualified electors voting in each part of the county or counties proposed to be dismembered and embraced in the new county shall separately vote therefor.

3. STATUTE. *Partial invalidity.*

If section 16 of the Laws 1916, chapter 527, providing that indictments pending in Harrison county should be tried there instead of in Stone county when elected, was violative of constitution of 1890, section 26, as denying a public trial by a jury of the county where the offense was committed, this would not invalidate the whole act providing for the creation of Stone county.

4. SAME.

Nor does the fact that section 14 of the act require Stone county to execute and complete contracts entered into by Harrison county so far as they affect the territory of Stone county invalidate the entire act.

APPEAL from the chancery court of Harrison County.
HON. W. M. DENNY, Chancellor.

Bill by P. L. Hatten and another against A. W. Bond and others. From an order sustaining a demurrer to the bill complainants appeal.

The facts are fully stated in the opinion of the court.

Mixe & Mixe, for appellant.

The act creating Stone county is a special statute, and the rule, as we understand, is that all the requirements of a special statute have to be complied with or there can be no legal effect to anything done or created under it. What does this special statute provide? Section 3 provides that, upon the approval of the act by the governor, within ten days after the 22nd day of March, 1916, the governor should appoint three commissioners from the territory proposed to be taken from Harrison county who should be residents of said

territory, and that said commissioners should provide and hold an election as thereafter provided. This section specially provides that there should be three commissioners appointed to hold an election to determine the creation of Stone county and that these commissioners should hold said election as thereafter provided in said act. One of the sections "thereafter providing" the requirements of said election is section 15 of said act, pp. 15, 16, which precisely provides that the commissioners appointed under section 3 of said act shall do two things: first, "shall divide into convenient voting precincts the territory embraced in Stone county," and, second, "shall also provide for the registration of the qualified electors in said territory at least ten days before said election." The bill of complaint alleges that the commissioners appointed under said section 3 failed to do either one of these things, and we say that it is essential to a valid election that they should have complied with said provisions. 26 American & English Enc. of Law, p. 665.

The act creating Stone county is a special statute delegating powers to the three commissioners to be appointed by the governor, and every power delegated to them would have to be exercised and complied with and in the manner designated by the statute before any act of theirs under such statute would be valid. *Garrigus et al v. Board of Commissioners of Parke County*, 39 Ind. 67.

The letter of the act creating Stone county was that the commissioners, before election, should divide the territory into convenient voting precincts and provide for registration of the qualified electors of said territory at least ten days before the election, and these things were not done. *Dickson v. Hill*, 75 Ga. 369; *Marsales v. Garrison*, 27 S. W. 929; *Dudley v. Mayhew* (N. Y. Appeals), Comstock, 9; *State v. Coleman*, Sec'y State 13 N. J. Rep. 98.

In the instant case, if the true meaning of a majority of the qualified electors of the territory embraced in Stone county has been found, by majority of seventy-nine votes, that they desired the creation of Stone county, yet it has not been reached in the manner required by law, on account of the failure of the commissioners to divide the said territory into convenient voting precincts and to provide for the registration of the qualified voters in said territory at least ten days before the election.

We submit that, under the foregoing authorities, each and every step set out in the act creating Stone county should have been, by the commissioners, taken in the manner directed by said act. It has always been our understanding, from law-student days, that a special act authorizing anything to be done or created under said act must be specifically followed and every step specified must be taken and in the manner prescribed or the thing done or created is null.

Our next complaint is that the act creating Stone county violates section 260 of the constitution of Mississippi. We have been unable, after diligent search of the provisions of constitutions somewhat similar of sister states to find any construction of a provision like this one with reference to the point urged. The governor, when he signed this act, had before him the opinion of the attorney-general of Mississippi that the act was unconstitutional because it violated this section, and we herewith append as exhibit "A" to this brief a copy of said letter. So we submit that our construction of this provision is the correct one.

Appellants contend further that the act creating Stone county is null and void because of the following provision in section 14 of said act, to-wit: "That all contracts heretofore entered into by the county of Harrison, as far as the same affects the said Stone county shall be executed and completed by Stone county.

This violates section 16 of the Constitution of the state of Mississippi and article, 1, subdivision 10, of the Constitution of the United States, in that it impairs the obligation of contract. *Gunn v. Barry*, 15 Wallace, 610; *White v. Hart*, 13 Wall. 646.

Appellants contend that said act creating Stone county is further unconstitutional because section 16 of said act violates section 26 of the Constitution of Mississippi, in that it prohibits a man charged with crime from being tried in the county where the crime was committed, as said section 16 of said act provides that all criminal cases pending at the time of its passages in the circuit court of Harrison county should be tried in Harrison county. A man has the right to be tried in the county where the crime was committed, and therefore a person charged with crime committed in the territory embraced in Stone county should be tried in Stone county, and this is prevented by said section 16 of said act.

We submit that the court erred in not granting the injunction prayed for by appellants and in dismissing their bill of complaint, and that this court should reverse this cause therefor.

U. B. Parker and *W. G. Evans*, for appellee.

Coming to the first question raised in the bill of complaint, appellants contend that the law creating Stone county violates section 260 of the Constitution of the state of Mississippi, in that each dismembered part of Harrison county was not allowed to vote in the election to determine whether or not Stone county should be created.

Section 260 of the Constitution of the state of Mississippi reads as follows: "No new county shall be formed unless a majority of the qualified electors voting in each part of the county or counties proposed to be dismembered and embraced in the new county,

shall separately vote therefor; nor shall the boundary of any judicial district in a county be changed, unless, at an election held for that purpose, two-thirds of those voting assent thereto. The elections provided for in this and the section next preceeding shall not be held in any county oftener than once in four years. No new county shall contain less than four hundred square miles; nor shall any existing county be reduced below that size."

It does look to the pleader that the conclusion attempted to be drawn by appellants as to the provisions of this section are absurd. *Conner v. Gray*, 88 Miss. 489.

The next question raised in the bill of complaint is that the law is unconstitutional because section 16 of said act violates section 26 of the Constitution of the state of Mississippi in that it prohibits one charged with crime from being tried in the county in which the crime was committed. Section 16 of the law provides that all indictments found prior to the passage of the act and crimes committed in the territory taken from Harrison county shall remain to be disposed of in Harrison county.

Appellants do not especially press this contention as will be seen from their brief, and we are of the opinion that in order for them to have pressed this issue it would necessitate their trying to handle the county lines like marking off section 260 of the Constitution which suits them. All indictments found in Harrison county prior to the passage of the act were certainly found in the county where the crimes were committed, and had it not been for this action no one can certainly contend that the case would not have been tried in the county where the indictment was found and the crime committed. Again, the general statute provides for the removal of causes to the proper jurisdictions.

Last but not least, as it was said in the case of *Conner v. Gray, supra*, no persons affected are making complaints, and certainly the appellants here cannot be interested in the affairs of others.

Next, appellants complain that section 14 of said act providing for the disposition of contracts is violative of section 16 of the Constitution of the state of Mississippi and of the Constitution of the United States. In the original bill of complaint no mention was made of the contract had with Professor Huff, but the amended bill of complaint complains at great length that Professor Huff had a contract with Harrison county to teach the Agricultural High School, which had been by the creation of Stone County left therein.

Professor Huff is not a party to this litigation, and the court will of course not hear him nor hear complainants in his behalf.

Next, we come to section 15 of the law providing that the registration books of the county of Harrison shall be the registration books for the purpose of the election to be held in the territory to be embraced in the county of Stone and also provides for the registration of qualified electors in said territory at least ten days before said election. The court will notice that section 15 continues to read: "The polling places now established in the county of Harrison and embraced in Stone county shall be the same voting places for the purpose of holding the election under section 3 of this act but said Commissioners, if they see proper, may establish other voting precincts."

First, the bill of complaints says and contends under this law the election commissioners must register the voters ten days before the time of holding the election. We contend that the word "registration" in that section was typographical error and placed therein by inadvertence as the legislature of the state of Mississippi did not intend that a man who registered only ten days before an election could vote in the coming election in

violation of the Constitution of the state of Mississippi and the general statutes, both of which provide that no person shall be allowed to vote in any election unless he shall be legally registered for four months prior to the time he offers to vote. Was it intended by this law that the election commissioners should appear at the courthouse and permit all qualified electors who had registered to change their registration, if necessary. It would seem to a reasonable man that this was the intention of the legislature, and no complaint is made by appellants in this case that this was not done.

The next question discussed by the appellant deals with the allegations of the bill of complaint wherein it is alleged that election commissioners failed to divide the territory to be embraced in Stone county into convenient precincts. Now the law provides that the voting places now in Harrison county and embraced in Stone county shall be the voting places for the purpose of holding this election. The election commissioners were appointed by the governor and proceeded to hold the election and reported to the secretary of state their action and the result thereof. No living man, not even complainant in this bill of complaint, has complained that a single qualified elector was denied the right to vote, and not one line in the bill of complaint says that justice was not done. Not one word says that a correct result was not had, but now the appellants file their bill of complaint in the court below attacking the constitutionality of the law which has been passed upon by our courts letter for letter on each phase of the question. Again I say that the bill contains no allegation of fraud or any allegation in the world that the correct result had not been reached and that any act on the part of the commissioners would have changed the result of the election but still they say the commissioners did not divide the territory embraced in Stone county into convenient voting places. Appellants very ingeniously attempt to ingender into the litigation a matter which would

bring about a question of fact not because anybody has been deprived of his right to vote, for according to the bill of complaint they were not, because any other result would be reached, for they do not allege it.

So we say that since all the constitutional questions raised here have been passed upon in the case of *Conner v. Gray* and since the court has held in the native *Lumber case* and the *McHenry case, supra*, that the courts will not disturb and interfere or inquire into acts of these election commissioners, it seems to us that the litigation here instituted and now continued can only have one effect, and that is to diminish the credit of and hinder the successful operation of the county government which has been created by a fair and square election, in which a majority of the sovereign votes were cast, and in which these two complainants have been allowed to signify their dissent, has carried in favor of the establishment and operation of the county.

In the case of *Hinton v. Perry County*, 84 Miss. 536, very conveniently overlooked by appellants, a bill of complaint was filed alleging that practically everything necessary to be done by the board of supervisors before the holding of the election had not been done, and in addition thereto they alleged that instead of the voters being in favor of the removal of the county seat there were two hundred majority against it, the supreme court held that the board supervisors must do certain things in holding the election, but they, by their minutes, had said that that was done and that all necessary to be done had been done and that the election had carried, and the supreme court not only dismissed the bill of complaint carrying with it a bond for injunction but spanked the complaint with a liberal attorney's fee.

With absolute confidence in what the result will be, we submit the case. The first cause of demurrer to the amended bill of complaint, is as follows: "Because there is no equity on the face of the amended bill of complaint." We submit that even this cause of demurrer

covers every allegation in the amended bill of complaint and would warrant the court in sustaining and affirming the decree in the court below.

We call the court's attention to the other causes of demurrer contained in the record from page 46 to 51 inclusive, and submit to this court that all of said causes of demurrer are well taken and together with the first cause above set out completely dispose of every allegation in the bill of complaint.

We can see no material difference between this cause and the case of *Conner et al. v. Grey et al.*, 88 Miss. 489.

It is always a delicate judicial duty to declare an act of the legislature unconstitutional, and in doubtful cases, it should be avoided. *Campbell v. Union Bank*, 6 How. p. 625; *Newson v. Cocke*, 44 Miss. 352. The statute should be sustained if possible, but the constitution must be preserved inviolate. *Thomas v. Grand Gulf R. R. & Banking Co.*, 3 How. 240. Where the meaning of a clause in the constitution is doubtful a statute alleged to be in violation of it, will be held valid. *Newson v. Cocke*, 44 Miss. 352.

It is a cardinal rule for the construction of the constitution and of statutes, that the intention of the legislature or convention is to be deduced from the whole, and every part of the statute or constitution taken together, the words and the context and such construction adopted as will best affectuate the intention of the law maker. *Green v. Waller*, 3 Geroge, 650.

He who insists on the unconstitutionality of a law upon the ground, that it impairs a right of his must show he had a right impaired by the law: *Dejarnett v. Haynes*, I. C. 600.

We submit that the complainants, the appellants in this court have not shown any right of theirs, which has been impaired by the law. We submit that the decree of the chancellor in this case sustaining the demurrer to the amended bill and dismissing said cause, should be affirmed by this honorable court.

HOLDEN, J., delivered the opinion of the court.

By chapter 527, Acts of the legislature of 1916, approved January 6, 1916, the legislature authorized the creation of Stone county, composed of territory taken entirely from Harrison county. Following this act, the Governor appointed three commissioners, who held an election in the territory of the new county on the question of the creation thereof. A majority of the qualified electors in the territory embraced within the proposed county voted for its creation. The result of the election was duly certified to the secretary of state, and the Governor issued his proclamation, declaring the said county of Stone created. Following this, the Governor appointed the county officers, who assume their respective duties. The county was duly organized, and had been exercising its powers and functions as a county for about a month, when the appellants, P. L. Hatten and R. W. Davis, resident taxpayers, filed their bill in the chancery court of Harrison county against A. W. Bond, supervisor, and other officers of the county of Stone, seeking to enjoin these officers from issuing a loan warrant of five thousand dollars; from issuing bonds or incurring any expense in maintaining and operating said county government; and praying that the act of the legislature, authorizing the creation of the new county, be declared null and void, and that the election, creation, and organization of said county of Stone be declared null and void, as being illegal and unconstitutional. The defendants in the court below demurred to the complainants' bill, which demurrer was sustained by the chancellor, and the complainants below appeal here.

The contentions of the appellants, according to the allegations of their bill, are as follows:

First. That said county of Stone was not legally created, because the three commissioners appointed to hold the election failed to divide into convenient voting precincts the territory embraced in the proposed

county of Stone, and failed to provide for the registration of electors in said territory ten days before said election, as required by said act.

Second. Because the act creating Stone county violates section 260 of the state Constitution, in that it authorizes the creation of said new county upon a majority vote of the qualified electors of the territory embraced in the proposed new county; that the legislature could only authorize the creation of the new county by a majority vote of the qualified electors of the territory embraced in the proposed county and a majority vote of the qualified electors voting separately therefor in the remaining territory of the old county of Harrison.

Third. Because the act creating Stone county violates section 26 of the state Constitution, in that it prohibits one charged with crime from being tried in the county in which the crime was committed.

Fourth. That the act is unconstitutional because section 14 of said act impairs the obligation of contracts.

If we concede, for the purposes of the discussion, that appellants are such parties as may maintain a bill of injunction in a case of this character, and further concede, for the same purpose, that appellants are not estopped because of their failure to act until about one month after the county was organized still we think the decree of the chancellor in sustaining the demurrer to the appellants' bill was eminently correct. We will discuss the different contentions of the appellants in the order in which they appear above.

As to the first contention of appellants in reference to section 15 of the act: By reading the act it will be observed that provision is made therein "that the registration books of the county of Harrison shall be the registration books for the purposes of the election to be held in the territory embraced in the county of Stone, . . . and the polling places now established in the county of Harrison and embraced in Stone county

shall be the voting places for the purpose of holding the election under section 3 of this act.

We think that this is sufficient authority for the purposes of holding the election; and the fact that said section 15 provides that qualified electors shall be registered ten days before said election, and that the commissioners, if they see proper, may establish other voting precincts and shall divide the territory into convenient voting precincts, which was not done, does not invalidate the election, as it was discretionary with the commissioners as to establishing new precincts and to register a person ten days before election would not qualify him to vote, and would be a useless proceeding. The appellants make no complaint in their bill that any fraud was perpetrated, or that any qualified elector was denied the right to vote, or that the election was not in all respects fair and regular. Furthermore, the election appears to have been held regularly, the returns thereof certified to the secretary of state, and the Governor proclaimed the county created.

As to the second contention of appellants: The language of section 260 of the state Constitution is plain, and means exactly what it says; that is, that:

“No new county shall be formed unless a majority of the qualified electors voting in each part of the county or counties proposed to be dismembered and embraced in the new county, shall separately vote therefor.”

In this case, Stone county was carved wholly out of Harrison county, and the question of the creation of the county could properly be determined only by a majority of the qualified electors voting in that part of the county proposed to be dismembered and embraced in the new county. Certainly it does not mean, as contended by counsel for appellants, that this question of creating the new county should have been voted on by the qualified electors in the territory of the proposed new county and also by the qualified electors in the territory of the old, or remaining, county of Harrison.

Such a construction would be erroneous and violent, indeed. *Conner v. Gray*, 88 Miss. 489, 41 So. 186, 9 Ann. Cas. 120.

As to the third contention of appellants, regarding section 26 of the Constitution, providing that the accused shall have a public trial by a jury of the county where the offense was committed: We fail to see what interest appellants could have in the constitutionality of this part of the act. It seems that such a question might be raised by one who was charged with crime committed in the Stone county territory, and whose case was pending in Harrison county at the time of the creation of the county of Stone; but at all events, if this particular provision were unconstitutional and void, it could be lifted out of the act, and the other parts and sections could stand without it as a valid act, authorizing the creation of Stone county.

Referring to the fourth contention of appellants, in which it is claimed that the act authorizing the creation of Stone county is unconstitutional, in that it impairs the obligation of contracts, it seems that the only basis for this contention is that Mr. J. A. Huff had a contract with Harrison county to teach the Agricultural High School for three years, and that the high school is now in the new county of Stone. We cannot see what substantial interest appellants could possibly have in the contract entered into between Mr. Huff and Harrison county. They could be affected only remotely, if at all. The act authorizing the creation of Stone county provides that Stone county shall take care of certain contracts entered into by Harrison county. But if the contention of the appellants were true, in reference to the impairment of this particular contract, still that part of the act could be declared void and the remainder of the acts creating the county held valid and constitutional, and in no view can the appellants successfully claim that this particular part of the act invalidates the whole.

Therefore, summing up all the contentions urged here by the appellants, upon which they rely in their endeavor to have a court of equity declare the creation of Stone county null and void, and, in effect, to dissolve it, with the confusion, injury, and damage necessarily resulting therefrom, we do not think there is sufficient merit in their position to justify the relief sought. Stone county was legally and constitutionally created by the legislature and a majority vote of the qualified electors embraced in its territory, and it must remain so for all time to come, unless changed or abolished by the citizenship thereof, according to the law of the land. The decree of the lower court is affirmed.

Affirmed.

GREGORY ET AL. v. CITY OF AMORY.

[73 South. 614, Division B.]

MUNICIPAL CORPORATIONS. *Ordinances extending limits. Appeal statute.*

Where a city formerly operating under chapter 99 of the Code of 1906, after the passage of the commission government (chapter 120, Laws 1912), adopted the commission form of government and after coming under commission form of government proceeded to extend the limits of the city under section 3301 of Code 1906, chapter 120, Laws of 1912, providing no scheme for extending corporate limits; an appeal from an ordinance making such extension lies to the circuit court on compliance with section 3303 of the code and such appeal should not be dismissed on the theory that section 18 of chapter 120, Laws 1912, suspended or superseded sections 3303 and 3304 as to cities under commission form of government since the referendum provision contained in chapter 120, Laws 1912, and chapter 158, Laws 1912, do not affect the code sections on appeals in such cases.

APPEAL from the circuit court of Monroe county.
HON. CLAUDE CLAYTON, Judge.

APPEAL by A. J. Gregory and others to the circuit court from an ordinance extending the limits of the city of Amory under Code 1906, section 3303, from a judgment dismissing the appeal to the circuit court, appellants appeal.

The facts are fully stated in the opinion of the court.

D. W. Houston, Sr., & Jr., and J. O. Prude, Jr., for appellant.

As intimated in our statement, the motion and contention of opposite counsel is reducible to about this: that, although the city of Amory is operating under chapter 120 of the Laws of 1912, and in attempting to enlarge its boundary by adding this adjacent unincorporated territory, was acting and proceeding, and passed an ordinance, solely and exclusively under and pursuant to, and by virtue of, sections 3301-3302 and 3305 of chapter 99 of the Code of 1906 (which was the only law authorizing it to so proceed) and not at all under, or pursuant to, or by virtue of, chapter 120 of the Laws of 1912,—that these appellants, who owned lands in the territory attempted to be so added, and who, therefore, were persons interested under section 3304, of the same chapter 99,—had no right of appeal under said sections 3303 and 3304, and no right whatever to have any court to pass upon the validity or reasonableness, of said ordinance; but that the so called referendum provided by section 18 of chapter 120 of the Laws of 1912, was the method, and the sole and exclusive method and way by or under which the reasonableness or validity of said ordinance could be passed upon, and the sole and exclusive remedy which these appellants had or were entitled to; and that, although said chapter 120 of the Laws of 1912, did not expressly repeal said sections 3303 or 3304 of said

chapter 99, but on the contrary section 25 of said chapter 120, of the Laws of 1912, specifically provided that "all laws governing cities operating under the provisions of chapter 99 of the Code of 1906, not inconsistent with the provisions of this Act shall apply to and govern such cities respectively when organized under this act;"—still, notwithstanding this, that said chapter 120 did by implication repeal said sections 3303 and 3304—or, to state the first part of the proposition in other words, the contention of opposite counsel amounts to this, that, although the exclusive and only way or law, by or under which these city authorities could possibly proceed to enlarge its boundary or territory, and the only law under which it was, as a matter of fact, acting and proceeding in passing this ordinance, was said sections 3301, 3302 and 3305—still that those against whose interests they were acting and whose lands were being included by such action and ordinance, did not have a correlative right to have their action and ordinance passed upon by the circuit court by an appeal under the same law—chapter 99, although the very next sections (sections 3303 and 3304) following the sections (3301 and 3302) under which the city was proceeding—provided for an appeal to, and a hearing by, the circuit court in favor of any person interested."

According to their contention, sections 3301 and 3302 which immediately precede, and section 3305 which immediately follows, said sections 3303 and 3304, must and should be left in tact so as to give the city the authority, right and power to proceed to pass such an ordinance including appellant's lands, and that they are not at all inconsistent with the provisions of chapter 120 of the Laws of 1912, and are in no way repealed, either expressly or by implication, but that said sections 3303 and 3304—parts of the very same chapter and relating to the very same subject-matter and proceedings, and which confer upon the parties against whose

interests and lands the city is proceeding, the right of appeal and a hearing that these sections, forsooth, are to be bodily cut and carved out of the Code, not by an express or explicit repeal, but by a fine-spun argument that they are repealed by implication; and thus, by a strained implication that said aggrieved and interested parties are denied an appeal or any hearing whatever.

A part of a certain law upon a certain subject-matter and proceeding is not repealed at all, but remains in tact, but another part of the same law upon the same subject-matter, and proceeding, is repealed by an implication purely and simply, and torn up by the roots.

Their contention also amounts and leads to this; that the power and authority of the mayor and commissioners to thus proceed to pass this ordinance to include this land are solely and exclusively derived from and governed by one law, to-wit; chapter 99, Code 1906, and yet the parties aggrieved by this action under this law have no right of appeal and hearing and no right or remedy which they have is not a right of appeal or a right to a hearing before any court, but an entirely different and separate and independent right derived from and governed by an entirely different, separate and independent law, to-wit: Section 120 of the Laws of 1912.

Expressed in other terms, the contention is that the rights and remedies of one of the parties to a certain suit or proceeding about a certain subject-matter are derived from, and governed by, a certain law solely and exclusively; but the other party to the same suit about the same subject-matter has no right or remedies whatever under said law; but his rights and remedies are derived from and governed by a different and separate law, solely and exclusively.

These are some of the conclusions and results which logically and inevitably follow the contentions made by counsel. We respectfully submit that their contentions are untenable and the results which follow from them

Brief for appellant.

[112 Miss.]

would operate unjustly upon the rights of interested parties.

Neither said section 18 of chapter 120 of the Laws of 1912, nor any other provisions of said law, specifically or affirmatively refer to, much less repeal either said sections 3301, 3302 or 3304 of the Code of 1906, giving the power and authority to the board to enlarge the territory of the city or the way it shall proceed; nor sections 3303 and 3304, giving the persons interested, who own lands which are attempted to be included, the right of appeal to and a hearing by, the circuit court, and the way they may proceed. Said Laws of 1912, repeal said sections 3301-2 and 3305 as much, and no more, as they do sections 3303 and 3304. The truth is that said Laws of 1912 are equally silent as to each and all of said sections,—except that section 25 of said chapter 120 of the Laws of 1912, refer in a general way to chapter 99 of the Code of 1906, of which each and all of said sections are a part providing, as heretofore stated, that “all laws governing cities operating under the provisions of chapter 99 of the Code of 1906, not inconsistent with the provisions of this act, and all general and special laws, applicable to special charter cities and not inconsistent with the provisions of this act, shall apply to and govern such cities respectively when organized under this act.”

If said sections 3303 and 3304 of the Code of 1906, are inconsistent with the provisions of the laws of said Act of 1912, and are repealed by it, then by the same token, said sections 3301-2 and 3305 of the Code of 1906, are equally inconsistent with the provisions of said Act of 1912, and are also repealed thereby, and, therefore, said city authorities had no right to thus proceed at all to enlarge the territory of said city, because the only law under which it could proceed would be under said sections, as said Act of 1912 does not provide for the extension of the city limits.

Said section 25 of said Act of 1912, provides that "the territorial limits of every such city shall remain in the same as under its former organization" and all rights and property of every description which were vested in such city, under its former organization, shall vest in the same under the organization contemplated by this act; and no right or liability, either in favor or against such city, and no suit or prosecution of any kind shall be affected by such change unless otherwise provided for in this Act.

The truth of this whole matter is that none of said provisions of the Code of 1906 are inconsistent with said Act of 1912, and none of said sections are repealed thereby.

That the law does not favor, but rather frowns upon, the repeal of a statute by implication, is too well settled to require an extended citation of authorities; and it is equally well settled that "if two are seemingly repugnant, they should be so construed, if possible, that the latter shall not be a repeal of the former by implication." *Richards v. Patterson*, 30 Miss. 583; *Eskridge v. McGruder*, 45 Miss. 294; *City of Holly Springs v. Marshall County*, 104 Miss. 752; *Richards v. Patterson*, 30 Miss. 503; *Ferguson v. Monroe County*, 71 Miss. 524. To the same effect is *Deberry v. Holly Springs*, 35 Miss. 385; *Wilson v. Wallace*, 65 Miss. 13, and many other cases.

We respectfully submit that the lower court erred in dismissing the various appeals of these appellants and ask that this court will reverse and remand this case.

Leftwitch & Tubb, for appellee.

Opposing counsel say in their brief that to cut out sections 3302-3303-3304 is to repeal by implication; were we to grant this, which we do not, because this court in the city of Jackson case held to the contrary and by

every logical reason, but we might grant it and still save our case.

By section 25 of chapter 120, Acts of 1912, it is provided that all laws governing cities operating under the provisions of chapter 99, Code of 1906, not inconsistent with the provisions of this act, and all general and special laws applicable to specially chartered cities, and not inconsistent with the provisions of this act, shall apply to and govern such cities respectively when organized under this act. So that there is no repeal here by implication, it is by express provision of the act in question. The legislature most assuredly would not have enacted section 25 of the act if it did not recognize that many of the provisions of chapter 99, Code of 1906, would not be applicable to the commission form of government in a city, and the legislature could not repeal these provisions of chapter 99, without doing great violence to cities which in their wisdom did not adopt the commission form of government, and to the hundreds of municipalities in the state of Mississippi to which the act could not be made to apply. The only thing left to the courts, is, what provisions are inconsistent, and it is no arrogance on the part of the circuit court to decide that question, and none on the part of this court. As was said by Judge CAMPBELL in one of his concise opinions referring to an act repealed by implication that the act repealed could not stand because it was true in law as in physics, that two bodies could not occupy the same space at the same time, and therefore the last expression of the legislature must stand and the first be superseded. The legislature of the state of Mississippi in section 25 recognized the force of the same compelling logic, that two bodies cannot occupy the same space at the same time, by sections 3303-3304 of the Code, the person interested, and who is interested has lately been dealt with by this court in the case of *Thornton v. The City*

of *Charleston*, 109 Miss. 255—may submit the reasonableness of the ordinance to the circuit court to be tried by a jury on an issue made up; but that right is certainly taken away by the act establishing the commission form of government for cities. Even were we mistaken and should we agree for appellee's sake that it is not taken away altogether, it cannot possibly be exercised until the reasonableness *vel non* is first submitted to that other jury, the electorate of the city of Amory, as the electors have chosen to do. In the case of *Adams v. The Lumber Co.*, 103 Miss. 491, this court held that appellee was estopped, had estopped itself to raise the question it did in the lower court; we might argue just as well here, that when the citizens of Amory voted to adopt the commission form of government with all its incidents, and put the initiative and referendum in force fully and making the people supreme at every juncture, they estopped themselves to apply for redress to a jury, before first resorting to the forum which they themselves have chosen. Legislatures usually defer to the votes of the people in these matters, and the courts should do the same thing. 28 Cyc. 209, and note.

We said a moment ago that there was no repeal by implication here, and we say so still, but if the learned counsel are correct that there was repeal by implication in this kind of case as we read it, has just lately been approved in the case of *City of Jacksonville v. Boden*, 64 So. 769. See also, *Yazoo City v. Lightcap*, 33 So. 949. Not for the decision of the precise question but for the general trend of decision of courts of last resort affecting this act in their jurisdictions, we refer the court to the following causes which deal at length with the all-prevailing force of referendum statutes and of the ultimate authority that by those statutes when legally enacted and legally enforced, is vested in the people. *Walker v. City of Spokane*; Am. Annotated Cases 1912-C an extended note, citing all the authori-

ties. *State of Wash. v. Tausick*, 35 Law Rep. (N. S.) 802; *Eckerson v. Des Moines*, 115 N. W. 177; *Cole v. Dorr*, 23 L. R. A. (N. S.) 534.

Our friends, the appellants, complain while claiming their right of appeal that the argument of appellee in effect is that the statute remains intact for some purposes, and is repealed for other purposes, but the provisions of chapter 120, Laws of 1912, not by implication but by express enactment, as we have already quoted, have done that very thing. In other words, by section 25, they have said that the laws governing cities, etc., not inconsistent with the provisions of this act, etc., shall apply to and govern such cities respectively, when organized under this act. The legislature did not go on and say what was necessary, that such as were inconsistent should not govern such cities respectively, when organized under this act, for the inclusion of one excludes the other, and as we have said, the legislature could not repeal the inconsistent provisions of chapter 99, because they were essential to the government of other municipalities. What the legislature did was tantamount to the same thing as far as this case is concerned and as far as the commission form of government is concerned. Such laws as are inconsistent are a thing apart from all matters applying to commission form of government, and cannot be appealed to by the suitor.

ETHERIDGE, J., delivered the opinion of the court.

This is an appeal from a judgment of the circuit court of Monroe county dismissing the appeals of the appellants in said court from an ordinance extending the limits of the city of Amory. The city of Amory formerly operated under chapter 99 of the Code of 1906, but after the passage of the commission government act (chapter 120, Laws of 1912) adopted the commission form of government, and after coming under commission form of government proceeded to extend the limits of the city of Amory under section 3301 of the Code.

112 Miss.]

Brief for appellee.

Chapter 120, Laws of 1912, provided no scheme for extending corporate limits. From the ordinance making this extension the appellants appealed to the circuit court, complying with section 3303, but motion was made to dismiss said appeals on the theory that section 18 of chapter 120, Laws of 1912, suspended or superseded sections 3303 and 3304 as to cities under commission form of government, and that the referendum provided for in section 18 of chapter 120, Laws of 1912, was an exclusive method of testing the adoption of ordinances extending the city limits, or, if not exclusive, was at least a condition precedent, and that a petition for a referendum must first be resorted to before appeal. We think the circuit court was in error in dismissing the appeals; that sections 3303 and 3304 are a part of the scheme provided for in section 3301 for extending the city limits, and a city having resorted to this section to extend the limits must be burdened with the right of appeal provided for in sections 3303 and 3304. The referendum provision contained in chapter 120, Laws of 1912, and chapter 158, Laws of 1914, do not effect the above section. The referendum is not a proceeding to test the reasonableness of an ordinance, but is a part of a legislative scheme for enacting municipal ordinances, and the voters may vote for or against an ordinance under these provisions for any reason he thinks proper, whether it be reasonable or unreasonable. One or more persons affected may appeal under the Code provisions, while it takes twenty-five per cent. under the commission government act and twenty per cent. under the initiative and referendum act (chapter 158, Laws of 1914) to secure an election. The provisions are entirely separate, and the right of appeal is not affected by the right of the referendum.

We think the learned judge below committed error in sustaining the motion to dismiss, and the cause is reversed and remanded.

Reversed and remanded.

NEW ORLEANS & N. E. R. Co. v. WOOD.

[73 South. 615, Division B.]

1. CARRIERS. *Live stock carriers. Injuries to stock. Claim for damages. Time of filing. Waiver.*

Where the owner making an interstate shipment of live stock shipped them under a bill of lading, providing that as a condition precedent to recovery for injuries to the stock, the shipper should give notice in writing of the claim to a general officer or the nearest station agent, before removing the stock from the cars or from the place where it was unloaded, within twenty-four hours after the stock reached the place of destination, a substantial and not a literal compliance with the terms of the contract is all that would be required in any case, and the benefit of this provision could be waived by the station agent of the carrier.

2. SAME.

Under such a bill of lading, where the very station agent who by the contract was authorized to accept the written notice assured the shipper that he would have sufficient time to propound his claim, and such agent assisted the shipper in unloading the car and in making an examination of the live stock, their injuries, general condition and the apparent damage to the entire shipment, and taking the expense bill himself, made a written notation thereon of the damage which he personally observed and signed his name thereto. In such case the requirement for written notice was waived and the shipper could recover the damage he sustained.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Suit by W. R. Wood against the New Orleans & Northeastern Railroad Company. From a judgment for plaintiff, defendant appeals.

Appellee, W. R. Wood, as plaintiff in the court below, instituted this action in the court of a justice of the peace of Jones county to recover one hundred, ten dollars damages to a carload of cattle shipped by the plaintiff from New Orleans, La., to his own order at Ellisville, Miss. The cattle were loaded at New Or-

leans, La., about six o'clock p. m. of August 1, 1914, and were during that night transported to Ellisville, Miss., the point of destination, ready for delivery early on the morning of August 2d. The plaintiff himself superintended the loading of the cattle at New Orleans and then took passage upon one of the regular passenger trains of appellant about eight-thirty p. m. on the evening of August 1st, and himself called at the station of appellant at Ellisville early on the morning of the 2d, to receive the shipment. It is the testimony of plaintiff and his witnesses that when plaintiff went to the stock pen where the car was placed, the cattle were piled or jammed up in one of the rear-end corners of the car; that one was lying dead upon the floor of the car, and others appeared to be bruised and injured; that when the car was opened, he found that three were down on the floor of the car, two of which were still living, and which he succeeded in getting out of the car in a dying condition; that one died on the way home; and several were terribly bruised; that the steer that was dead in the car had his ribs crushed in, and was otherwise bruised and skinned. The evidence further shows that before appellee accepted the shipment he notified Mr. Ward, the regular station agent at Ellisville, that plaintiff was not willing to receive the cattle in the condition they were in, saying to the agent "that they were terribly damaged, and I wanted him to know any injuries they received, because I expected damages for them;" that Mr. Ward went down with plaintiff and personally examined the shipment, and himself made notations upon the expense bill of the damage which he then and there observed. Appellee further testifies as follows:

"I notified the railroad company before I received the cattle that I would ask for damages through their agent, Mr. Ward. . . . I asked him what was the rules about it, and he said he didn't know any particular time, but I had ample time, but I notified him there,

and took the notice on that expense bill, so I would be armed with sufficient evidence to show the condition of the cattle when I received them."

At another point in his testimony he says:

"At the time that he (the agent) wrote that notation, there were one or two that hadn't died. One or two died after the notation was made."

The following question and answer then appears:

"Q. You are positive he told you that (referring to the question of time for the notice)? A. Yes; that I would have ample time."

The plaintiff further testified that while he received, himself, the bill of lading, and paid the freight on the shipment, he did not read over the document, and therefore did not actually know that the bill of lading contained the provision shown in the eighth clause thereof, which is as follows:

"Eighth—As a condition precedent to his right to recover any damages for any loss or injury to said live stock, the party of the second part shall give notice in writing of the claim therefor to some general officer or to the nearest station agent of the party of the first part before the said stock is removed from the cars in which it was shipped—or from where it has been unloaded and before such stock is mingled with other stock; and such written notification must be served within twenty-four hours after said stock has reached such place or point of destination, to the end that such claim may be fully and fairly investigated, and a failure fully to comply with the provisions of this clause shall be a bar to the recovery of any and all claims for damages, loss or injury."

The bill of lading covering the shipment is the uniform bill of lading commonly used by carriers in interstate shipment, styled: "Live Stock Contract, Limiting the Liability of Carriers." On the trial of the case in the circuit court, appellant requested an instruction from the court that if the jury believed from the evi-

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Brief for appellant.

dence that the plaintiff failed to give to the defendant the notice in writing required by clause 8 of the contract, they should find for the defendant. This instruction was by the court refused, and is here assigned as error. The jury returned a verdict in favor of the plaintiff, and from the judgment based thereon appellant appeals.

Ben F. Cameron, Jr., A. S. Bozeman, R. H. & J. H. Thompson and Fulton Thompson, for appellant.

Appellee's counsel contend that the notice required in the eighth clause of the live stock contract has been waived by the appellant Railroad Company. It is not stated in their brief what is relied on to work this waiver; but we assume it is the testimony of appellee that, in response to his inquiries as to the time within which claims must be filed, the station agent of appellant replied that he did not know, but thought there was ample time. This is the only evidence we can find on which counsel's contention might be based. In other words, appellee maintains that this declaration on the part of a local station agent, whose authority the record does not disclose, serves to excuse him from fulfilling the term of a contract signed by himself, a copy of which he owned; the contents of which he is conclusively presumed to know.

The bill of lading governing this shipment had been regularly established and put in force under the Interstate Commerce Act and Amendments. See *C. N. O. & T. P. Ry. Co. v. Rankin*, *supra*. The contract was executed under the Carmack Amendment and the provisions of this statute enter into and form a part of it. See *Northern Pacific Ry. Co. v. Wall*, 241 U. S. 87; United States Advanced Opinions, 1915, page 493, 495. Its provisions, if valid, must be enforced as written, and their application cannot be varied by any oral representations or agreements. As the United States supreme

court said in the case of *Atchinson T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 Law Ed. 901, 904: "To maintain the supremacy of such oral agreements would defeat the primary purposes of the interstate commerce act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers.

Counsel for appellee seem to differ with us as to the construction to be put on the language used by the United States supreme court in the case of *Georgia, Florida & Alabama Railway Company v. Blish Milling Company*, 241 U. S. 190, United States Advanced Opinions, 1915, page 541. The court, speaking through Justice HUGHES, of the power of parties to waive the requirements of a contract of affreightment which was executed under the Carmack Amendment, used the following language: "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed." To our minds, this language conveys very clearly the idea that parties cannot vary the terms of these contracts, because inequality and discrimination, the evils which the Interstate Commerce Laws seek to correct, would be the inevitable result. On this point the United States supreme court said, in the case of *New York, New Haven and Hartford, R. Co. v. Interstate Commerce Commission*, 50 Law. Ed. 200, (U. S.), 361, 515, 521; "If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose. It was to compel the carrier, as a public agent, to give equal treatment to all.

It is patent that, if a station agent of a carrier could, by work or act, waive or excuse performance of a valid stipulation of a bill-of-lading, the rankest abuse would follow and the ends sought to be obtained by the commerce laws would be completely thwarted. For this reason, it is the policy of the law, in order to secure equality of treatment to all, to repudiate any agreements or representations, by whomsoever made, which vary the express terms of the contract or excuse the performance thereof. As further supporting our views on this question we refer the court to the case of *Kidwell v. Oregon Short Line R. Co.*, *supra*, and the case of *M. K. T. R. Co. v. Harriman Bros.*, 57 Law Ed., 227 U. S. 657, 690, 697.

Counsel for appellees think that the question of waiver is forever settled in this state by the decision of the court in the case of *Lasky v. Southern Express Company*, 45 So. 869. Examination of this case shows that the loss which formed the basis of the suit occurred in November, 1903, nearly three years before the passage, by Congress, of the Carmack Amendment. The conclusions there reached are, of course, superseded by this amendment to the commerce laws of the United States and the decisions of the Federal courts construing same. It can be readily seen that the learned judge did not consider the question before him a Federal one, to be controlled by Federal legislation and decisions; for instance, it is stated in the opinion that: "We have no case holding that a carrier may limit the time within which suit shall be commenced after they have received notice of the loss or damage, and since the passage of section 3127 of the Code of 1906, the question is of no practical importance." Thus indicating that it was in his mind that the state statutes controlled. On this very point the supreme court of the Nation, in the *Harriman* case cited *supra*, upheld a stipulation in a bill-of-lading requiring suit to be brought within ninety days. In the *Lasky* case the court further said: "These stipulations

are made on the contracts of shipment, and are rarely read by the shipper, and the one ground upon which they can be upheld is that they are reasonable regulations—not contracts in the true sense.” A doctrine directly contrary to this has been repeatedly held by the United States supreme court. See, for instance the case of *Northern Pacific R. Co. v. Wall*, *supra*.

The decision cited by counsel therefore, has no application to the present case, since it was rendered without reference to the interstate commerce laws of the United States, and particularly the Carmack Amendment, and before Congress took such complete and exclusive charge of interstate transportation as is clearly found by reference to the Federal decisions, cited in this brief and others rendered in recent years. It is clearly in conflict with the Federal decisions cited in support of our position, and no subtlety of argument by counsel can reconcile it with them. We submit, therefore, that, even if the conduct of the station agent at Ellisville was such as to constitute a waiver, the notice required in the eighth clause of the contract could not, under the law, be waived.

W. J. Pack and Jeff Collins, for appellee.

Counsel for appellee contends, lastly, that even if this requirement of the regulation as to the time of giving notice by appellee of his claim was not sufficiently complied with and was a reasonable regulation, yet it was waived by the railroad company. Counsel for appellant, in their brief say that this provision of the contract cannot be waived by the railroad company or its agents and cite in support of this contention *Georgia, Florida & Alabama Railroad Company v. Blish Milling Company*, 241 United States, 190, but we submit that what the court holds in that case was that the parties could not waive the contract of carriage to a suit *in trover* for the conversion of the goods. It will be fur-

ther noticed in that case that the court had under consideration the regulation requiring written notice to be given within four months after the shipment reached its destination and not twenty-four hours as in this case. Our course in the case of *I. C. Railroad Company v. Bogard*, 27 So. 879, construing a contract of shipment—it was an interstate shipment—requiring notice to be given within ten days after the shipment had reached its destination, held that it was waived by the railroad company. But we think this question is forever settled in this state by the case of *Lasky v. Southern Express Company*, 45 So. 869, and we submit that this case is not *contra* to the opinion in the *Blisk Milling Company case, supra*. Judge MAYS, in the case above cited, construed the so called “contract” as a “regulation” made by the company for the benefit of the carrier and not a contract in the strict sense of the word. The court had under consideration a regulation in an interstate shipment requiring written notice to be given within ninety days, when in fact, no written notice was ever given. The court held that for the railroad company to make a defense that the regulation had not been complied with it must show two things, namely; first, “when the shipper makes complaint of damages or loss it must show that it has done nothing to mislead him or cause him to believe that it has waived the requirement that the claim shall be in writing. When the claim is made to a carrier, even when it has in the contract of shipment the requirement that it shall be in writing, if it accepts a verbal claim, without protest, and undertakes to deal with the claim in any way, it waives the requirement that it shall be in writing. If the carrier intends to stand upon this stipulation it must decline to have anything to do with a claim which is propounded verbally, and notify the person undertaking to propound his claim in this way, at this time; and if it does not, and deals with the claim in any way, or does anything which leads the shipper into the belief that this

requirement has been waived, it cannot afterwards insist upon it." Second, "it must be reasonable as to the time;" as quoted from the record above, the testimony in this case shows that the shipper went to the company's agent and had him go to the car in which the cattle were at the time and look at them and note down their condition on the expense bill, and the agent not only did not refuse to do this, but told him that there was no regulation as to the time to put in a claim. But counsel say that it cannot be waived under the United States decision of the case of *Georgia, Florida & Alabama Railroad Company v. Blish Milling Company*, *supra*, and insist that that case so holds, but we submit that a cursory study of the case reveals that this is not the point. The point decided, as stated above, is that a suit *in trover* for the conversion of the shipment cannot be brought to escape the contract. It will be noted that there was no action of the railroad company shown upon which a presumption of waiver could be based. It was the shipper in that case trying to escape the provisions of the contract.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). We base an affirmation of this case upon the testimony which tends to prove, and which is sufficient to warrant the jury in finding, that the provisions of the contract in reference to notice of claim for damages were waived. The only point argued by counsel for appellant is the alleged failure of appellee to give the notice required by clause 8 of the contract. Counsel cite, as binding upon this court, *Atchison, etc., R. Co. v. Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050, *Northern Pacific R. Co. v. Wall*, 241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905, *Cincinnati, etc., R. Co. v. Rankin*, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, *Georgia, etc., R. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L.

Ed. 948, and other pronouncements of the Federal supreme court. We readily concede the binding authority of these cases wherever and whenever applicable to the facts of any particular case. The contention is here made that, under the decision of the Federal supreme court, in *Georgia, etc., R. Co. v. Blish Milling Co., supra*, the agent of appellant could not waive any of the provisions of the contract covering an interstate shipment. We do not so construe the opinion in that case. The court did decide that the shipper could not waive or utterly ignore the entire contract and sue the carrier *in trover*. He could not, by changing the form of his action and suing in tort, escape the obligations imposed upon him by the contract. In the instant case, the contract itself provides that the provisions requiring written notice of the claim to be served within twenty-four hours after the stock reaches the point of destination is inserted "to the end that such claim may be fully and fairly investigated." It is inserted for the benefit of the carrier. A substantial, and not a literal, compliance with the terms of the contract is all that would be required in any case. We see no reason why the benefit of this provision could not be waived.

The evidence in the present case sufficiently shows a waiver. The very station agent, who, by the contract, is authorized to accept the written notice, assures the shipper that he will have sufficient time to propound his claim; and the circumstances under which he gives this assurance, taken in connection with the language employed by the agent, might, naturally, mislead any ordinarily prudent man. The regular station agent was personally notified of the damage within a few hours after the shipment arrived, and the agent himself assisted the shipper in unloading the car and in making a personal examination of the live stock, their injuries, general condition, and the apparent damage to the entire shipment. In making this personal observation the

agent takes the expense bill, and himself makes a written notation thereon of the damage which he personally observed, and signs his own name thereto. In addition to the verbal notice given by the shipper, and the personal examination made by the station agent himself and his written notation upon the expense bill of the extent of the damage as he saw it, appellee, on the 18th day of the same month, filed a formal written demand for damages. The expense bill referred to had the following notation:

“Two dead, one in bad condition, the balance bruised and in bad shape. Received payment for the company, August 2, 1914.

“M. E. WARD, Agent.”

The failure to give any formal written notice within the twenty-four hours stipulated did not under the circumstances of this case, in any way prejudice the rights of appellant. It accepted the verbal notice; its agent made the necessary examination, made a written notation of the extent of damage, and himself assured the shipper that the latter had ample time in which to propound his claim for damages. The shipper followed up this understanding with the agent by formally filing his written claim for damages in a few days thereafter; and the presentation of this subsequent written claim on the 18th day of August in no wise changed the claim which plaintiff interposed on the day he received the injured cattle. The wholesome purpose which the provision for notice was intended to serve was fully accomplished.

Liberal instructions were given appellant on the trial in the court below, the case was fairly presented to the jury, and there is no reason to disturb their verdict.

Affirmed.

WEISSINGER ET AL. v. DAVIS ET AL.

[73 South. 617, Division B.]

COUNTIES. Officers. Liability for illegal acts. Who may sue.

Under Code 1906, section 346, providing that if a board of supervisors shall appropriate any money to an object not authorized by law, the member of the board who did not vote against the appropriation shall be liable personally for such sum of money, to be recovered by suit in the name of the county, or in the name of any person who is a taxpayer who will sue for the use of the county, and who shall be liable, for cost, the tax-payer's right is fixed by the statute and if the object of the appropriation was lawful the taxpayer's suit must fail, and an averment in the declaration charging corruption will not confer upon such taxpayer a right to maintain the action.

APPEAL from the circuit court of Desoto county.

HON. E. D. DINKINS, Judge.

Suit by S. S. Weissinger and others, for the use of themselves and others similarly situated, against E. P. Davis and another. From a judgment sustaining a demurrer to the declaration and dismissing the cause, plaintiff appeals.

The facts are fully stated in the opinion of the court.

R. F. B. Logan, for appellant.

Shands & Montgomery, for appellees.

Cook, P. J., delivered the opinion of the court.

This suit was instituted by appellants, citizens and taxpayers of Desoto county against the appellee E. P. Davis, a member of the board of supervisors of said county, and the surety on his official bond, to recover for an appropriation made by the board of supervisors "to an object not authorized by law," which appropri-

tion it is averred that Mr. Davis did not vote against. The court sustained a demurrer to the declaration, the cause was dismissed, and the plaintiffs appeal.

This suit was brought under section 346, Code of 1906, and, inasmuch as the averments of the declaration clearly show that the alleged appropriation was made to an object authorized by law, we can find no warrant of law for the maintenance of this action. The right to sue is fixed by the statute, and plaintiffs did not bring themselves within its terms. Averments of facts which would infer corruption do not alter the case. The statute fixes the terms, and if the object for which the appropriation was made was lawful, that ends the matter.

It may be that the attorney-general or the district attorney of the district would be authorized to bring the suit made by the declaration, but it is certain that members of boards of supervisors may not be harassed with lawsuits of this class by taxpayers. We do not, of course, express an opinion as to the case if brought by the proper authority, and only mean to say that, although the declaration may make out a case properly brought, we nevertheless hold that the parties to this suit were not authorized to bring the suit.

Affirmed and dismissed

JONES v. LINCOLN COUNTY.

[73 South. 620, Division B.]

1. HIGHWAYS. *Highway districts. Employment of counsel.*

Where a board of supervisors was interested in maintaining the validity of bonds issued by it, in a proceeding to organize a good road district and the road commissioners were interested to defeat the bond issue, so that the interest of the board of super-

visors and the interest of the commissioners was in direct conflict, in a suit to sustain the regularity and validity of such bonds the commissioners were entitled to be represented by counsel of their own choosing although the board of supervisors had employed able counsel to represent both sides of the controversy.

2. HIGHWAYS. *Good roads districts. Statute. Construction.*

Under Laws 1914, chapter 176, section 5, in relation to the duty and powers of highway commissions and providing that such commissioners may employ legal counsel if necessary, such board of commissioners are not required to submit contracts for the employment of counsel to the board of supervisors, since the act does not specifically require this to be done, although such act does require that the commissioners submit to the board of supervisors for approval their plans for the establishment and construction of roads.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by P. Z. Jones against Lincoln County. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

COOK, P. J., delivered the opinion of the court.

We avail ourselves of the statement in the briefs for the facts of this case, as the statement will make clear our conclusions, and it reflects the issues involved:

"This is a suit for an attorney's fee against Lincoln county for services rendered in winning the suit of *Lincoln County et al. v. C. S. Butterfield et al.*, 72 So. 274, under employment by 'good road commissioners.' A claim allowed and approved by the road commissioners was filed before the board of supervisors, and a warrant requested, which being refused, an appeal was prosecuted to the circuit court, where the action of the board was affirmed. Motion for a new trial was made and overruled, and an appeal is taken to this court. By agreement of the parties, the record in the supreme court in the cause aforesaid is to be considered as a part of this record. . . .

"The road commissioners who employed the attorney did not have themselves made parties to the litigation, but the names of taxpayers were used in getting the question involved before the court; these taxpayers appearing by supplemental bill, with the consent and on invitation of the original complainants in the original bill.

"Some several years previous to January, 1916, supervisors' district No. 1 of Lincoln county had been organized into a good roads district, under Laws 1910, ch. 149, the predecessor of chapter 176, Laws 1914. Under this last-mentioned law an effort was made to organize the entire county into a good roads district, embracing and including the good roads district of supervisors' district No. 1. New commissioners were appointed for the enlarged district, and the old commissioners were removed, or rather one of them, Hon. M. McCullough, resigned, and the board of supervisors removed the other two by order placed on their minutes. Provision was made for the issuance of bonds in the sum of two hundred thousand dollars, and bids were advertised for and received and accepted, and the bonds sold to the two banking institutions of Brookhaven, Miss.

"Some question was raised by the law firm of Dillon, Thompson & Clay, expert bond attorneys, as to the validity of the proceedings by the board, and the bond issue was turned down until an order of the courts could be obtained sustaining their regularity. An arrangement was made for a friendly test suit. . . .

"The board employed counsel to defend the suit, and about this stage of the game the commissioners of the good roads district, realizing that the taxpayers of district No. 1 were about to be subjected to double taxation, after they had constructed their own roads, for the purpose of building roads in other portions of the county, and that good roads district No. 1 was about to be abolished and wiped out, while their obli-

gations were left intact, and an additional burden of two hundred thousand dollars placed upon them, sought the employment of counsel to represent the taxpayers of good roads district No. 1 in this matter. . . .

"The contentions made by the complainants in the original and supplemental bills were sustained by the supreme court, and the wisdom and good judgment of the road commissioners as to the preservation of the interest and good of district No. 1 were thus vindicated. The rights of that district represented by them were unlawfully assailed by the board of supervisors, as was demonstrated by the holding of the supreme court."

This litigation involves and is controlled by section 5, chapter 176, Laws 1914, and the precise question submitted to us is about this: Did the road commissioners have the authority to employ an attorney to represent the interests of road district No. 1 in the litigation mentioned in the statement of facts, without first obtaining the approval of the board of supervisors? As we understand the case, we are simply called on to interpret the statute. The statute is in these words, viz:

"Highway Commission Created; Duties and Powers of Same.—That it shall be the duty of the board of supervisors in case such election shall result in favor of the issuance of bonds, or if there be no election, at their next regular meeting, or any subsequent meeting, appoint three commissioners, who shall be qualified electors of such district or districts and real estate owners therein, who shall hold office for a term of four years from the time of their appointment and until their successors are appointed by the board of supervisors, whose duty it shall be to have the management and supervision of the construction and maintenance of the roads built under the provisions of this act, subject to the approval of the board of supervisors; and for their services shall be paid their actual expenses, not exceeding one hundred dollars each per

annum; such commissioners may employ legal counsel if necessary, and pay a reasonable compensation for the same; and it shall be the duty of such commissioners, subject to the approval of the board of supervisors, to determine and fix what road or roads shall be constructed or constructed and maintained or maintained in such district or district out of the proceeds of the sale of such bonds and the levy of such taxes; and it shall be their duty to let all contracts for the construction, or for the construction and maintenance or for the maintenance of such roads in the manner now provided by law for the letting of contracts for public work by the board of supervisors; and it shall be their duty to employ a competent engineer to survey and lay out such road or roads in such district or districts, as they shall determine upon, whose duty it shall be to make an estimate of the cost of constructing and maintaining such highway or highways for each separate mile covered by such survey, and report such survey and estimate to said commissioners before contracts are let for the construction or for the construction and maintenance of such highway or highways; which survey and estimate said commissioners shall have the power to adopt or reject and in the latter event to have another made; and when adopted, it shall be their duty to report the same to the board of supervisors, whose duty it shall be to order the clerk of said board to file the same among the records of the office, and spread the same on the minutes of the board and make an order adopting such survey, and estimate so reported and adopted by such commissioners; all of which acts of said commissioners to be subject to the ratification or rejection by the board of supervisors."

It is perfectly obvious that the board of supervisors was interested in maintaining the validity of the bonds issued by it, and it is equally clear that it was to the interest of the road commissioners to defeat the bond issue. So, as a matter of fact, the interests of the board

of supervisors and the interest of road district No. 1 were in direct conflict.

True, lawyers were employed to represent both sides, and we do not go outside the record when we say that they fully and ably performed the duties assigned to them, but it nevertheless appears that the road commissioners were not represented by counsel chosen by them, and we think they were entitled to counsel of their own selection, if the law gave them this right.

It would seem clear that the statute (section 5, chapter 176, Laws 1914) in express terms confers this power upon the commissioners. The statute requires that the plans for the establishment and construction of the roads shall be submitted to the board of supervisors, and very properly so. When we come to consider that part of the statute authorizing the employment of "legal counsel if necessary, and pay a reasonable compensation for the same," we fail to find anything in the statute which indicates that the legislature intended that the commissioners should first obtain the approval of the board of supervisors. Nothing of that kind appears in the statute, and it is the statute we are construing.

It will be clear to all lawyers that it was necessary to recognize the supervisory control vested in the board of supervisors over the public roads, and this thought was evidently in the mind of the draftsman of the statute in question, and it is also quite clear that the administrative features of the act were confided to the road commissioners, and seems clear from the context that the legislature did not intend to require that contracts for the employment of legal counsel should be submitted to the board of supervisors.

This being our view of the meaning of the statute, we think the trial court erred in holding to the contrary; and, as there seems to be no controversy about the propriety of the employment of counsel, or the size

of the fee, the judgment of the circuit court will be reversed, and judgment will be entered here for the amount of the fee agreed upon.

Reversed, and judgment here.

BANK OF TUPELO v. HULSEY.

[73 South. 621, Division B.]

1. TRIAL. *Collateral note. Action to recover interest. Instruction.*

Where plaintiff brought suit against a bank to recover his alleged interest in a note which had been deposited as collateral with the bank and collected by it, where the evidence strongly tended to show a partnership between plaintiff and the party pledging the note, an instruction was erroneous, which authorized a verdict for the plaintiff if he had an interest in the note and had not agreed that it might be pledged as collateral, since such an instruction was prejudicial to defendant as ignoring the evidence as to a partnership.

2. PARTNERSHIP. *Partnership debt. Liability.*

A partner is individually liable for the debts of a partnership.

3. PARTNERSHIP. *Collateral. Proceeds. Application.*

Even though plaintiff had an individual interest in the proceeds of a note, pledged by a joint owner without plaintiff's knowledge or consent and over his protest, with the defendant bank for its loan to a partnership, and if at the time the bank collected the proceeds, plaintiff was liable to the bank for past due partnership obligations, then the bank had a right to apply the separate interest of plaintiff toward liquidating the partnership liability, and after the money had been so applied plaintiff could not maintain an action to recover the same.

3. SAME.

In such action before plaintiff could recover on the theory of money had and received by the bank for his use and benefit he was required to show that he was not a partner in the firm pledging the note.

APPEAL from the circuit court of Lee county.

HON. CLAUDE CLAYTON, Judge.

Suit by F. W. Hulsey against the Bank of Tupelo. From a judgment for plaintiff, defendant appeals.

Appellee was plaintiff in the court below, and in his declaration seeks to recover four thousand and three hundred, seventy-five dollars with interest, alleged to be due him by the appellant, Bank of Tupelo, as plaintiff's interest in a certain promissory note for ten thousand and three hundred, seventy-five dollars which had been pledged as hereinafter mentioned, and the proceeds of which had been collected by appellant. It appears that E. B. Hulsey & Co. were doing a cotton brokerage business at Tupelo, and pledged the note in question for a loan of ten thousand dollars which the bank made to E. B. Hulsey & Co. on or about May 20, 1911. The note in which appellee claims an interest is a certain note for ten thousand, three hundred seventy-five dollars executed by one Arnold and Mayson in favor of Enoch C. Jones, and indorsed by Enoch C. Jones, and then indorsed by three parties by the name of Hulsey, being heirs of a certain Hulsey estate in Georgia, and being all the adult heirs of said estate except E. B. and F. W. Hulsey. This note was given by Enoch C. Jones as part of the purchase money of certain real estate brought from the Hulsey estate in Georgia, and was turned over to E. B. and F. W. Hulsey as their portion of the proceeds of this real estate transaction. At that time E. B. Hulsey was, and for a long time had been engaged in the cotton business at Tupelo under the trade-name of E. B. Hulsey & Co. About October, 1910, F. W. Hulsey, appellee herein, moved from Georgia to Tupelo, Miss., to engage in the cotton business with his brother E. B. Hulsey. The testimony is conflicting as to whether appellee became an employee of E. B. Hulsey & Co. or a partner in the business. The proof on the part of appellant was sufficient to warrant the jury in finding that appellee was a partner in this cot-

ton business. A portion of this testimony tends to show the following facts: That about the latter part of October, 1910, F. W. Hulsey moved from Georgia to Tupelo and was introduced to the officials of the bank by his brother, E. B.; that these brothers represented to the management of appellant bank that F. W. Hulsey had come to engage in the cotton business with his brother and would be interested as a partner in the firm; that they thereupon requested continued accommodation from the bank; that just prior to the time F. W. Hulsey moved to Mississippi the mother of these brothers had died leaving a valuable estate in Georgia, and that some of this real estate had been sold to Enoch C. Jones, and that two notes evidencing deferred payments were taken for ten thousand, three hundred seventy-five dollars each, and each bearing six per cent. interest; that these notes had been executed by Reuben Arnold and Corlas L. Mayson in favor of Enoch C. Jones and by Jones indorsed to the Hulseys, one of the notes being for one year and the other for two years; that shortly after F. W. Hulsey came to Tupelo he returned to Atlanta and collected the one-year note, and came back with New York exchange for ten thousand dollars which he, on October 25, 1910, deposited with the Bank of Tupelo, appellant herein, and placed five thousand dollars of the proceeds to his individual credit and five thousand to the credit of E. B. Hulsey. At the same time E. B. Hulsey drew his individual check on his deposit or checking account for three thousand dollars and placed this sum to the credit of E. B. Hulsey & Co. with the bank, and simultaneously F. W. Hulsey by check placed three thousand dollars of his funds to the credit of E. B. Hulsey & Co. A few days thereafter, on November 7th, the two brothers came into the bank and simultaneously deposited five hundred each to the credit of E. B. Hulsey & Co. On November 16, 1910, E. B. Hulsey deposited with appellant the second real estate note, the one here in dispute, as collateral or margins

against the running cotton account of E. B. Hulsey & Co., and thereupon the cashier executed to the firm the following receipt:

“November 16, 1910. Received of E. B. Hulsey & Co. note of Reuben R. Arnold and Carlos H. Mason, favor Enoch C. Jones, ten thousand, three hundred seventy-five dollars, to be used as margin against their cotton account.

M. H. MOORE, Cashier.”

That continuously thereafter E. B. Hulsey & Co. did business with appellant and were indebted to appellant in large sums of money, and on May 20, 1911, E. B. Hulsey for and in the name of E. B. Hulsey & Co. executed to the bank a note for ten thousand dollars, payable on demand, and attached or hypothecated this Arnold and Mayson note as collateral security for the note so executed. It is the further testimony on behalf of appellant, and especially its officials, that F. W. Hulsey took charge of the office of E. B. Hulsey & Co. and appeared to be the manager thereof, answering calls, making deposits, drawing checks, and otherwise conducting the office work for the firm; that F. W. Hulsey lived in the same home with his brother, E. B., and ate at the same table; that while F. W. Hulsey claimed in his testimony in this case to have been working on a salary, representations had been made to the officials by both E. B. and F. W. Hulsey that F. W. was coming to Tupelo to go into the firm, and that after he came he was held out to the management of the bank as a partner in the business, and was so considered by the officers of the bank. The ten thousand dollar note evidencing the loan by appellant to E. B. Hulsey & Co. was not paid, and appellant collected the collateral note in question and applied the proceeds to the large indebtedness due by E. B. Hulsey & Co. to appellant. It is the testimony of the cashier that E. B. Hulsey & Co. in 1912 became financially involved, and after credit-

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ting the proceeds of the note in litigation the firm of E. B. Hulsey & Co. was still due and owing appellant a balance of forty or fifty thousand dollars.

F. W. Hulsey denied the partnership, and testified that, after his brother deposited the note with the bank in pursuance of the first receipt hereinabove copied, he notified the bank that he had a personal interest in the note and objected to the note being used as further collateral for any indebtedness of E. B. Hulsey & Co. He stated that he was employed at a salary of one hundred twenty-five dollars a month; that the advance of three thousand dollars at one time and five hundred dollars at another, shown to have been made by him to E. B. Hulsey & Co., represented loans, and not his portion of the firm's capital. He introduced in evidence two promissory notes, one for three thousand dollars and the other for five hundred dollars executed in his favor by E. B. Hulsey & Co., the first purporting to be dated October 25, 1910, and the second November 7, 1910, as evidence of the loans which he had made. Appellant insists that these notes were executed long after the dates which they purport to bear and as a part of a scheme to avoid partnership liability. These original notes were introduced in evidence, and at the request of appellant were transmitted to the supreme court to support the charge made by appellant that the year "1911" was first written on the notes, and that the figures "1" at the right-hand corner of each note manifestly appears to have been changed to an "0." It is the further contention of appellant that the blank form on which these notes were executed was not in existence or in use by the bank in the year 1910, and it is the bank's contention that these notes were forgeries and evidence an afterthought on the part of E. B. and F. W. Hulsey when they had become financially involved. The collateral note in dispute was not indorsed either by E. B. or F. W. Hulsey at the time it was attached as collateral, but was indorsed in blank by Jones and the

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other Hulsey heirs. E. B. Hulsey corroborated his brother's statement that appellee was not a partner in the firm. Appellee also introduced a letter written by Mr. Porter to the cashier in answer to an inquiry which the cashier had written regarding the Arnold and Mayson note, the letter being dated at Atlanta, Ga., October 29, 1910, addressed to the Bank of Tupelo, and containing the following statement:

"The other Hulsey heirs took this note, and it was turned over to Fred and Ely Hulsey as a part of their portion of the proceeds. The other adult Hulsey heirs indorsed the note in question. I do not think you need fear any complication in handling this paper."

From this it is contended by appellee that the bank officials had notice of Ely Hulsey's interest in the note. There is other evidence *pro* and *con* reflecting sharp conflict between the testimony and theory of appellant and the testimony and theory of appellee. The cause was submitted to the jury, and a verdict returned for the plaintiff for the full amount sued for. Appellant complains of the first and only instruction given the plaintiff, which reads as follows:

"The court charges the jury that, if they believe from a preponderance of the testimony that at the time the Arnold Mayson note was placed with the Bank of Tupelo as collateral security said bank knew that plaintiff had an interest therein of four thousand, three hundred seventy-five dollars and that said bank was notified that only the interest of E. B. Hulsey was so placed as such collateral, and that the interest of plaintiff was not so placed with them as such collateral, then the jury will find for plaintiff for four thousand, three hundred seventy-five dollars with six per cent. interest thereon from March 26, 1911."

It also complains of one instruction which it asked for and which the court declined to give. For the purposes of this opinion it is unnecessary to prolong the statement of the testimony.

W. D. & J. R. Anderson and *J. B. Harris* for appellant.

The instruction given for the plaintiff, appellee here, is manifestly erroneous. This instruction states a concrete case. It is erroneous in that it leaves out of view entirely one of the principal features of the defense by the bank; and that is that F. W. Hulsey was a partner in the firm of E. B. Hulsey & Company. The instruction undertakes to make a concrete application of the law to the facts of the case, and directs a designated verdict if these facts are delivered by the jury; if F. W. Hulsey was a partner in the firm of E. B. Hulsey & Company at the time the note was hypothecated for a partnership debt, he was entitled to recover his interest in the note as set forth in the instruction. We have shown in the foregoing part of the brief that there was ample evidence before the jury to support a finding, that he was a partner, and this being so, the bank had a right to the money arising from the proceeds of the note given to secure a partnership debt.

The court instructed the jury for the bank, it is true, in the seventh instruction, that if they believed from the evidence at the time the note in question was put up with the bank as collateral for the security of the indebtedness of E. B. Hulsey & Company the plaintiff, F. W. Hulsey, was a partner in the firm of E. B. Hulsey & Company, they should return verdict for the defendant, although afterwards he ceased to be a partner. This instruction correctly states the law, but it does not cure the error in the instruction given for the plaintiff. See, *Maheffey Co. v. Russell*, 100 Miss. 122, 126; *Godfrey v. Meridian, etc.*, 101 Miss. 565.

The instruction was not dealing with abstract propositions of law, but states a concrete case, and, therefore is not cured by the seventh instruction given for the defendant. This is not all. The instruction leaves out of view entirely the indemnity agreement entered

into between F. W. Hulsey and E. B. Hulsey and E. B. Hulsey & Company and the force and effect to be given to it, and in this respect this instruction is in conflict with all of the instructions given for the defendant, and it is not helped out by any of them because it warrants the jury in ignoring all of the testimony in regard to the positive indemnity agreement, as well as the partnership feature.

George T. Mitchell and W. A. Blair, for appellee.

The first instruction for the plaintiff simply tells the jury that if they believe from preponderance of the testimony that at the time the Arnold and Mason note was placed with the Bank of Tupelo as collateral security, that said bank knew that plaintiff had an interest therein of four thousand, three hundred seventy-five dollars and that said bank was notified that only the interest of E. B. Hulsey was so placed as such collateral, and that the interest of plaintiff was not so placed with them as such collateral, then the jury would find for the plaintiff in the amount sued for. The criticism of this instruction by appellant is that it does not announce an abstract proposition of law but states a concrete case, and that therefore the instruction should have gone farther and negatived the proposition that plaintiff was a member of the firm of E. B. Hulsey & Company. I cannot understand the soundness of this proposition. I recognize as fully as any one, the proposition that an instruction upon the facts should contain all the material facts, but I submit most earnestly to this court that the question as to whether or not F. W. Hulsey was a member of the firm of E. B. Hulsey & Company can make no difference provided he gave notice to the bank of his interest in the note and the further notice that his interest was not to be considered placed as collateral to the ten thousand dollar note. In other words, if F. W. Hulsey, this plaintiff, had been a member of the firm of E. B. Hulsey & Company at the

time the Arnold and Mason note was filed with the bank as collateral security, still, if he notified the bank at the time of his interest in that note and told them that his interest therein was not being placed as collateral, then they could not hold his interest therein as security any more than they could the interest of one who was not connected with the firm. I therefore insist that it was not necessary to mention the question of partnership in the instruction in question, because if he gave the notice contained in that instruction to the bank, then they could not hold his interest in the note in question regardless of whether he was a member of the partnership or not. It seems to me that this proposition is too plain for discussion. Can it be possible that one partner, who does not care to make a certain venture or enter upon some certain enterprise, cannot, by giving notice and entering a protest against a certain transaction, protect himself from the ventures of another partner? Such has never been the law and never will be. The two cases of *Maheffey Co. v. Russell*, 100 Miss. 122, and *Godfrey v. Meridian etc.*, 101 Miss. 565, are not at all applicable. In those cases this court simply held that taking the facts announced in the instructions in those cases as true, still, the plaintiff had not made out his case; that is, the court told the jury in those instructions that if they believed the facts set out in those instructions did not warrant a recovery by plaintiff that, therefore, the error in giving them was not cured by the giving of other instructions correctly announcing the law. The correctness of this holding has never been questioned, but nothing of that kind appears in the instruction in the instant case, which I submit correctly announces the law and if the jury believed as proven the facts set out therein, plaintiff was entitled to recover.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). Under the theory of appellant's defense and in the light of the strong testimony supporting its contentions, we regard instruction No. 1 given the plaintiff in the court below as erroneous and prejudicial to the rights of defendant. The testimony on behalf of appellant, as defendant, tended strongly to prove a partnership. There was evidence of admissions and of conduct on the part of E. B. and F. W. Hulsey calculated to lead the management of the bank at all times to assume that appellee was a partner in the business of E. B. Hulsey & Co. The testimony is undisputed that appellee put three thousand five hundred dollars into the business and looked out after the interests of the firm and helped in the management of the business in about the way that a partner would naturally be expected to do. If appellee was a partner in the business, then he was individually liable for the debts of the partnership. Conceding that he had an individual interest in the proceeds of the note which had been pledged with the bank and which is here sued for, it yet remains that appellant, after collecting the proceeds of this note, had the legal right to apply such proceeds toward the liquidation of past due indebtedness of E. B. Hulsey & Co. It is conceded that E. B. Hulsey also had an interest in the proceeds of this note, and in collecting the pledged note the bank, of course, had to collect the whole amount, and in any amount collected on the note appellee would have an undivided interest. Instruction No. 1 for the plaintiff takes no account of the partnership. It authorizes the jury to return a verdict for the full amount sued for upon the one condition that they believe from the evidence that the plaintiff had an interest in the note and that the plaintiff had not agreed for this interest to be pledged as collateral.

Even though E. B. Hulsey, one of the joint owners of the note pledged the same without the knowledge or consent or even against the protest of the plaintiff, yet appellant, after accepting this collateral and after collecting the same, would have been in the attitude of holding funds a portion of which belonged to appellee; and if at the time appellant collected the proceeds appellee was liable to the bank for past-due partnership obligations, then the bank had a right to apply the separate interest of appellee toward liquidating the partnership liability, and, after the money has been so applied, appellee could not maintain this action to recover the same. In his declaration Mr. Hulsey sues the bank on the theory of money had and received, and the undisputed proof on the part of the bank shows that the bank still claims a very large past due indebtedness against E. B. Hulsey & Co.

Before recovery can be had in this case the jury must believe and find from the evidence that appellee was not a partner in the firm of E. B. Hulsey & Co. The proof so clearly and strongly tends to establish a partnership that the granting of this, the only instruction which is given the plaintiff, constitutes error for which this case must be reversed. Our view of this instruction renders it unnecessary to criticize or pass upon instruction No. 8, which was refused appellant. It is the contention of appellee that any error in instruction No. 1 is cured by instruction No. 7 given appellant. The instructions appear to be in direct conflict, and, read together, left the jury a doubtful rule by which to measure and apply the facts. We have no doubt about the right of appellant to a new trial.

Reversed and remanded.

PERSONS v. GRIFFIN.

[73 South. 624, Division B.]

1. EXECUTORS AND ADMINISTRATORS. *Probating claim. Affidavit. Statute.*

The affidavit required under Code 1906, section 2106, to probate an account against the estate of a decedent, where there is no written evidence of the debt, must be made by the creditor himself and not by an agent, in such case an affidavit by the agent amounts to no affidavit at all.

2. EXECUTORS AND ADMINISTRATORS. *Probating claims. Authority of court.*

Courts have no right to assume the justice or correctness of any claim offered against the estate of a decedent, until the proposed claim has been duly probated in the manner provided by law.

APPEAL from the chancery court of George county.

HON. W. M. DENNY, Jr., Chancellor.

Proceedings for the allowance of the claim of T. W. Griffin against the estate of M. Nolan deceased. From a decree allowing plaintiff's claim, T. W. Person, temporary administrator, appeals.

The facts are fully stated in the opinion of the court.

O. F. Moss, for appellant.

It is well settled that section 1932, Code of 1892, section 2106, Code of 1906, regulating the probate, allowance and registration of claims against the estate of decedents is mandatory, and an affidavit to a claim which fails to conform to the requirements set out in the statute, is fatally defective and gives no jurisdiction to allow the claim. *Cheairs v. Cheairs*, 81 Miss. 662, 33 So. 414.

It will be noted from the record, page 3, that J. A. De Monbrun, agent for the claimant, signed and made affidavit to the account in question, while this court in the case of *McWhorter v. Donald*, 39 Miss. 779, 80 Am.

Dec. 97, *Walker v. Nelson*, 39 So. 809, and *Saunders v. Stephenson*, 47 So. 783, has held that it is essential to the validity of the probate of a claim against a decedent, that the creditor himself should make the affidavit required by law, and that an affidavit by an agent of the creditor will not do.

It is true that the claimant in the case at bar tries to make some excuse for not making the affidavit himself, but this court in the *Saunders* case above cited said:

"The affidavit upon which the note sued on was probated was not made by the creditor, but by her husband as her agent. This brings the question squarely within the holding in this court in *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97. It is true that appellee here offers some excuse for not making the affidavit which the statute requires, and also true that this excuse was wanting in the *McWhorter* case; but the decision in that case is based upon the peremptory requirement of the statute, a departure from which is fatal." *Citing Cheairs v. Cheairs*, 81 Miss. 662, 33 So. 414; *Walker v. Nelson*, 87 Miss. 268, 39 So. 809.

This court in all the cases cited above was construing section 2106 of the Mississippi Code of 1906, which requires that the creditor desiring to probate his claim against the estate of a decedent must sign the claim and make affidavit, etc.

It appears from page 2 of the record that the administrator's notice to creditors to file and probate their claims was first published on the 19th day of December, 1913, and under and by virtue of section 2107, Code of 1906, all claims not registered, probated and allowed according to law within one year from date were forever barred; but the lower court regardless of this section of the Code and long after the claim in question had become barred by the statute of limitation and directly in the face of the decision of this court in the case of *Lehman v. George*, 56 So. 167, on

motion of appellee, allowed and permitted the claimant to amend the affidavit to his claim, as shown by pages 10 and 11 of the record. In the Lehman case it is held that a claim against a decedent's estate not having been probated in the manner provided by law, so that its registration did not stop the running of the statute, the probate cannot on the application after the claim is barred by limitations, be amended, and that to hold otherwise would result in the nullification of section 2107 of the Code.

This court in the case of *Cudahy Packing Company v. Miller's Estate*, 60 So. 574, held that an affidavit attached to a claim presented to an executor, which fails to allege that the claim "is not usurious," as required by section 2106, Code of 1906, is insufficient, although it may appear, from an inspection of the claim, that it "is not usurious." In the case at bar appellee sets up in his answer to the petition of contest that an inspection of the claim here in question shows that the same "is not usurious" and that the omission of the word "not" was due to a clerical error. If it be fatal to omit the phrase "it is not usurious" in such an affidavit, it is certainly equally as fatal, or more so, to omit the word "not" so as to make the affidavit state that the claim "is usurious" as in the case in question. Appellee may say that he knew better and inadvertently omitted the word "not," but this is no defense. Any claimant who has failed to attach the proper affidavit to such a claim might say that he did so through inadvertence or mistake, but under and by virtue of section 2106 of the Code and the construction of this court placed on that section, this will avail him nothing. If appellee had applied in time to amend his affidavit, it might have been proper for the court to allow such amendment; but it surely is an error on the part of the lower court to allow appellee to amend the affidavit more than six months after the claim had been barred under section 2107 of the Code.

I, therefore, respectfully submit that the decrees entered in this cause for the reasons above set out and in the assignment of errors are wrong, and that the case should be reversed and a decree entered here for appellant disallowing said claim.

White & Ford, for appellee.

The remaining assignment of error relates to the fact that the claim was sworn to by the agent of appellee instead of appellee himself. While we have never been called upon to answer two more frivolous technicalities, containing no merit, than those in this case, appellant has made it necessary for us to answer the same, and thereby take up the time of the court.

After this proposition has been raised, the appellee in his answer set up that the agent swearing to the account was the agent of this claimant (appellee), and that appellee had no personal knowledge of the date and amount, etc., embraced in said account against Michael Nolan, deceased, and that the only person who had personal knowledge thereof was said agent who kept the books and was familiar with the transaction between this claimant and the said deceased Michael Nolan.

Before proceeding further, we would like to submit to the court the question of what benefit the appellant would have derived from the agent of defendant going to appellee and telling him that he had a certain account against the estate of Michael Nolan, deceased, and assuring appellee that the account was correct and then having appellee make affidavit of the same, not of his own knowledge, but only upon information derived from his agent who did make affidavit of the same.

Counsel for appellant seek to sustain this proposition upon the cases of *McWhorter v. Donald*, 39 Miss. 779; *Walker v. Nelson*, 87 Miss. 268; *Saunders v.*

Stevens, 47 So. 783. Also the *Cheairs case*, *supra*. The *Cheairs case*, and the case of *Walker v. Nelson*, do not discuss the agency proposition in any way. It is sufficient to say of the *McWhorter case*, that in that case there was strong suspicion that the husband was making the proof of the claim for his own benefit. We do not think this direct proposition has ever been put up to the court in this state.

We really feel a delicacy in making any further argument of this question to this court. In these days, where men of extensive interests transact the greater portion of their business through agents, we suggest that in all cases, it would be impossible for the creditor himself to make affidavit of the correctness of the claims of his business against estates. It cannot be said that a corporation cannot file a claim against an estate through one of its agents. This can be done, of course, without the calling of a director's meeting to authorize the agent to do so. Another case, suppose the creditor was sick and unable to attend to any business whatever. Would he be required to lose his claim because he was unable to sign the claim in his own handwriting, or would one of his employees, or agents, be allowed to make the necessary claim for him? Suppose the creditor dies. Would his executor or administrator be denied the right to file a claim against the estate in his own name? Or suppose a man was beyond the seas and was unable to return for some reason within the time required to make the necessary proof of the claim against the estate in his own name? Or suppose a man was beyond the seas and was unable to return for some reason within the time required to make the claim. Could the guardian of an insane person or a minor make the necessary proof of the claim against the estate of a deceased person, or would the claimant be forced to lose the claim by reason of his disability?

We are sure that the court will give no weight whatever to either of the contentions of appellant in this case and respectfully submit that the case should be affirmed.

STEVENS, J., delivered the opinion of the court.

Appellant, as temporary administrator of the estate of M. Nolan, deceased, filed exceptions to the allowance of a claim which appellee attempted to probate against said estate in the sum of seventy dollars and five cents. One of the objections to the claim as probated is based upon the failure of Mr. Griffin, the creditor, to make affidavit to his account as required by statute; the affidavit having been made by one of J. A. De Monbrun as agent. The chancellor, upon hearing the contest, overruled the objections interposed by the administrator, and allowed all the items of the account except an item of fifteen dollars, shown to have been barred by the statute of limitations. From the decree allowing this claim, appellant prosecutes this appeal. We shall discuss only the one ground of objection indicated.

The exceptions to the account as probated should have been sustained. There is no escape from this conclusion, unless we overrule previous decisions of this court. It is absolutely necessary for the creditor himself to make the affidavit provided by section 2106 of the present Code. An affidavit executed by an agent is insufficient and amounts to no affidavit at all. This is the express holding of our court in *Saunders v. Stephenson*, 47 So. 783, and prior announcements of our court there referred to by our Judge FLETCHER, especially the case of *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97. Since the decision in the *McWhorter-Donald* Case was announced, the statute has been reenacted, with the interpretation placed upon it by our court, and the principle thus announced and applied becomes firmly established as a part of the legislative policy protecting the estate of decedents.

Counsel for appellee refer to the account as a just claim, submitted in good faith by a creditor who had no personal knowledge of the dates and amounts of the items embraced in the account, and refer to the objections as "frivolous technicalities." This argument may sound well, but does not settle the legal difficulties. The court has no right to assume the justice or correctness of any claim offered against the estate of a decedent, until the proposed claim has been duly probated in the manner provided by law. This law was made for the just as well as the unjust, and the courts are without power to inquire into the equity or good faith of any account or claim whose probate is insufficient. The voice of the deceased debtor cannot be heard in explanation of any item attempted to be probated against his estate. The assets attempted to be charged with debts now belong to the innocent and inexperienced wife and children, and so it is that the individual creditor who propounds his claim must fashion his probate according to the pattern drawn by our lawmakers. While the record in the instant case shows that Mr. Griffin proceeded in the utmost good faith, it yet remains that the probate of his claim is legally insufficient. It follows that the decree of the learned chancellor must be reversed, and a decree entered here in favor of appellant sustaining the exceptions filed to the account and disallowing the entire claim.

Reversed and decree here for appellant.

Reversed.

CARUTHERS JONES SHOE CO. v. CHICKASAW COUNTY BANK.

[73 South. 609—49, Division A.]

GARNISHMENT. *Attorney's fees. Statutes.*

Code 1906, section 2361, which permits the court in exceptional cases rendering it proper, to allow to the garnishee reasonable compensation in addition to *per diem* and mileage, does not permit the allowance to him of an attorney's fee for defending an issue made by a traverse of his answer and it is immaterial whether or not the answer was filed within the time allowed by law.

APPEAL from the circuit court of Chickasaw county.
HON. H. MAHON, Judge.

ON SUGGESTION OF ERROR.

J. H. Ford, for appellant.

A. T. Stovall, *C. H. Moffat* and *Jas. R. McDowell* for appellee.

HOLDEN, J., delivered the opinion of the court.

The appellee suggests that we erred in our decision of this case, 73 So. 49, in that we misunderstood the facts in the record with reference to the time when the answer of the garnishee was filed, and claims that the answer was filed within the time prescribed by law. We gathered from the record, and from the undisputed statement in the brief of counsel for appellant, that the answer, for which the seventy-five dollars was allowed as attorney's fee for defending when contested by the plaintiff, was not filed within the time required by law, and we treated it as the only answer filed in the case. It does not appear that any compensation was or could have been allowed for the first attempt to answer; as no attorney's services were had in connection with

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the preparation and filing of the first so-called answer. However, if we concede that the contested answer was filed within the time required by law, still the decision must stand, because the law as announced in *Bernheim Bros. & Uri v. Brogan*, 66 Miss. 184, 6 So. 649, clearly precludes appellee from recovering the seventy-five dollars which was claimed, proved, and allowed as attorney's fee solely for defending the contested answer; and we again respectfully cite counsel to the decision in the above case.

Overruled.

HARRIS v. BYERS.

[73 South. 614, Division B.]

1. DEEDS. *Description. Sufficiency.*

Where the description in a land deed was "The land described as the north end of fractional southwest quarter of southwest quarter of section 33, township 18, range 15, containing four acres with the house on it, it sufficiently describes the land.

2. DEEDS. *Warranty. Deed of Trust.*

Where a grantor conveys land by warranty deed which at the time was covered by a deed of trust, he cannot acquire title from a sale under such trust deed and set it up against his grantor but the title so acquired inures to his grantee under his warranty deed.

3. DEEDS. *Property Conveyed. Description.*

Where a deed conveyed land described as the north end of the southwest quarter of the southwest quarter of a named section, township and range, containing four acres if the grantor did not own the entire north end of the southwest quarter of the southwest quarter, his conveyance of four acres off the north end of said subdivision would operate to carry four acres of land off the north end of whatever land he owned in said subdivision.

APPEAL from the chancery court of Oktibbeha county.

HON. A. J. McINTYRE, Chancellor.

Suit by Henry Byers against Henderson Harris and others. From a judgment overruling a demurrer to the bill, defendants appeal.

The facts are fully stated in the opinion of the court.

M. A. Saunders, for appellant.

Counsel for appellee is wrong in understanding that appellant contended that the word "fractional" carves out a reservation. The case of *McAllister v. Honea*, 71 Miss. 256, 14 So. 264, gives a very clear and lucid definition of what constitutes an exception. Quoting from the opinion in that case we find the following: "An exception is a clause of the deed whereby the grantor excepts something out of that which he has before granted by the deed." In this case nothing has before been granted and therefore surely nothing can be excepted. In that case the court goes on to state the necessary elements in a valid exception. While the *McAllister* case states well settled principles of law, nevertheless, it is wholly inapplicable to the case before us.

Coming now to the case of *Swann v. Mortgage Co.*, 75 Miss. 907, 23 So. 627, you can readily differentiate that case from the case at bar. In the *Swann* case the word "corner" was used; and, as said in the above opinion this gives a "base point" from which to start measurement and the court further said that the words "fractional corner" are a contradiction of terms. In the case at bar, we have no "base point" and are left simply to the resourcefulness of our own imaginations as to the point proper for commencement.

Discussing next, the case of *Hazlip v. Noland*, 6 S. & M. 294, we find that case to be a suit upon certain notes given by Joseph Galtney, deceased. Noland had executed and delivered to Galtney bond for title, and certainly gives particular description as to parts of

section and as to the county, but leaves out township and range, specifying particularly that said lands are on Cypress Creek; the court held that this description can be made absolutely certain and that, therefore, under the facts in that case, that the said description was valid. In the instant case, we have bill filed for the purpose of cancelling conveyances as a cloud upon the title. The Hazlip case was a plain action at law upon promissory notes. There was judgment for the plaintiff and judgment was affirmed. In this case, we have suit in equity which seeks definite and specific relief along lines indicated in the original brief and as specifically shown in the bill. We again most respectfully call the court's attention to the following cases: *Jones v. Rogers*, 85 Miss. 803, 38 So. 742; *Carlisle v. Trindall*, 59 Miss. 229; *Hart v. Broomfield*, 66 Miss.—5 So. 620; *Goff v. Cole*, 71 Miss. 46, 13 So. 870; *Wilkinson v. Hiller*, 71 Miss. 678, 14 So. 442; *Gregory v. Brogan*, 74 Miss. 699, 21 So. 521; *Wilberger v. Puckett*, 78 Miss. 650, 29 So. 393.

While this description is absolutely void, let us for the sake of argument, leave out the word "fractional," altogether and see where we stand. The description would then be "north end of the southwest quarter of southwest quarter, section 33, Township 18, Range 15 east, containing four acres with house on it." This would give a four acre strip off the entire north end of southwest quarter of southwest quarter of said section 33. Complainant, however, states specifically in his bill that this was not the land intended to be conveyed, but that "the land actually intended to be conveyed was a strip of land off of the north end of that part of the southwest quarter of the southwest quarter, section 33, Township 18, Range 15 east, lying east of the Starkville and Macon road. The same being of equal width at both ends and of sufficient proportion to constitute a block of four acres and to embrace the house re-

ferred to in said deed." The bill specifies, also, and alleges that "Horace Byers did not own the entire southwest quarter of the southwest quarter etc., but only that part lying east of the said Starkville and Macon road." Therefore, if we treat the word "fractional" as a mere nullity, still we find the complainant claiming yet another piece of land.

In other words, the description if corrected by the omission of the word "fractional" would not entitle the plaintiff to the land which he claims in his bill.

The demurrer in this case only admits those allegations which are well pleaded, and, with this in view, we are brought face to face with the decision of *Bowers v. Chess & Waymand Co.*, 83 Miss. 218, 35 So. 444. The court in that case, speaking through Chief Justice WHITFIELD, pointed out the fallacy of just such a proposition as is presented by appellee in this case. We admit everything in the bill which is well pleaded, but submit and contend most respectfully, that the complainant cannot show a deed which calls for one piece of land and seeks cancellation of title for another piece of land, which he claims was intended to be conveyed in the deed. Follow this matter logically, when the deed was offered it would certainly be rejected under "parole evidence rule," which is set out so concisely and clearly in the Bowser case.

G. Odie Daniel, for appellee.

Appellant's demurrer, being a general one, must be overruled if the bill is good in part. Besides asking for specific relief, appellee said: "If complainant has not prayed for proper relief, he now prays for such other, further, general and different relief as to the court may seem meet and proper in the premises etc. Therefore any relief not inconsistent with the allegations of the bill, but supported by it, could and should have been given so as to meet the demand of equity and good

conscience. This rule is so well settled that I shall only cite the old cases of *Pleasant v. Grosscock*, S. & M. Chey. 17.

That a grantor cannot acquire an outstanding title or interest in property so as to defeat his warranty is so well settled in this state that it is useless to search for authorities, but will refer only to *Bush v. Cooper*, 26 Miss 599, and *Mitchell v. Woodson*, 37 Miss. 567.

The only proposition urged by appellant in the lower court was that the word "fractional" modifying the description southwest quarter, southwest quarter constituted a patent ambiguity and that appellee could not travel. He renews the same proposition with the first paragraph in his brief in this court.

This word, if used as appellant seems to understand it, is intended to carve out of the southwest quarter of southwest quarter, a reservation. That "Fractional" is less than the whole southwest quarter of southwest quarter, and is intended to segregate part of that forty acres and carve the four acres conveyed out of part of the forty. Then if appellant is correct, the word fractional constitutes a reservation from the whole tract. If the word fractional had not been written into the deed, it is certain there would have been no trouble in locating the land intended to be conveyed. It would be a strip forty-four yards by four hundred forty yards off the north end of this forty acres. If it had been left out, there would have been no demurrer, possibly and possibly no appeal. This word if so used was intended to effect a reservation or exception to some part of the southwest quarter of southwest quarter. Our court held in *McAllister v. Honea*, 71 Miss. 256, that where an ambiguity related to the exception and not the whole, the exception should be disregarded. If it is disregarded, then the land in question will be four acres off the north end of this forty acre block and no ambiguity can exist, and no defect be pleaded. If the first deed referred to in the bill did not cover the whole

forty acres, but only that part east of the road, no allegation has been made in the bill as to how much, or how many acres there were east of said road, therefore it is a question yet to be determined, and oral evidence would be competent to determine the same.

Our supreme court in the case of *Swann v. Mfg. Co.* 75 Miss. 907, said: If reasonably possible such construction must be given as will uphold the deed and not impute to the parties the purpose to execute an instrument which is a nullity." In this case just referred to occurred the word fractional; and that word was by the court entirely eliminated.

But cannot the word "fractional" still be retained in the bill, and with the other words therein contained to-wit: "With a house on it" sufficiently indentify and locate the property so it may be located? I think it can. If I may seem to refer to old decisions too much, it is only because they are more exhaustive. In the case of *Hazlip v. Noland*, 6 How. 294, which construed a deed to property situated in the county we had the following deed to make good: "Know all men by these presents, that I, Pearce Noland of the county of Warren and State of Mississippi, bind myself, my heirs, and assigns, for six hundred and forty acres of land lying and being in Octibbeha (meaning Oktibbeha) county, on a branch called Cypress creek; the lots are described as follows, to-wit: three quarter sections in section seven; section five, one-eighth; in section four, one-eighth," etc., etc.

When this deed, or a deed conveying this property was offered as evidence in court, objection was made and deed excluded, and this, among other things was assigned as error. Chief Justice SHARKEY in passing upon this proposition said: "The defect relied on is that the township and range in which these sections are situated, are omitted in the description; that sections having these numbers are to be found in every township, and that each county must contain a number of

townships. This may be true (says Justice SHARKEY) and unaided by other descriptive calls, the description would be uncertain. But because there are other sections in the county designated by the same numbers, it does not follow that these sections lie on Cypress creek. The creek is the general or locative call; the sections, the particular call. If it should turn out that there are other sections of the same number on that creek then there is an ambiguity, but it is latent, arising not from the description but from a collateral matter, or extrinsic evidence and may be explained by parol testimony on the principal that when there are two or more persons or things which answer the description in the instrument, parol testimony is admissible to show which was intended"—Then after commenting on the lack of township or range the court further said: "But this apparent uncertainty like the uncertainty in the sections is removed by locating the parts of sections on Cypress creek."

This opinion has not been criticised, modified or overruled and what Judge SHARKEY said then is not only the law to-day, but the facts of that case fit into this case so well that they may be called identical. In that case, "three quarter sections in section seven" was not described by any other words, and it could not have been told which "three quarter sections" were meant, if the scrivener had not located the "quarter sections" on "Cypress creek." So in the case at bar. The court could not tell which "fractional" north end of southwest half was intended, if the scrivener had not stated which "fractional" it was, by saying it had "a house on it." Two peas were never more alike.

Clearly the authorities quoted by appellant were upon cases materially different from the one at bar. If the property cannot be located, or any part of it, by the description contained in the deed, then every one will admit there is a patent defect; but the "north end" can

be located. The "house on it" can be located, and if the "north end" is taken so as to include the "house on it" then we have the "four acres" we want, because as alleged in the bill, if the four acres were taken off the entire north end the strip would not be wide enough to include the "house." With "fractional" construed as being a proper word, or part of the description, the four acres conveyed can be located by two monuments; the "north end" of this southwest quarter of southwest quarter and "with a house on it."

The statement of appellant that complainant must show as perfect a title as would enable him to recover by ejectment, is too strong. If we should show that good a title, we might not have a standing in a court of equity because of an adequate remedy at law.

The bill shows that title was derived from a common source. We deraign the title from the time it was first in Henderson Harris to date, giving the dates, deed books and pages. Henderson Harris was the common source.

The demurrer was properly overruled. In the first place under the prayers in the bill special and general relief was sought, and if full relief could not have been secured partial relief could and the general demurrer should have been overruled. Again, if the deed cannot be construed so as to leave the word "fractional" then its elimination would entitle us to relief to a strip off the entire north end, because the word constitutes a limitation only and under the decision quoted the ambiguities of a reservation should not invalidate the whole deed. And lastly, under the very carefully added descriptions of "four acres, "north end" and, "with a house on it," we think the land can easily be located, coupling the number of acres, location with house and north end together. That four acres then could be as easily located as the whole southwest quarter of southwest quarter.

ETHERIDGE, J., delivered the opinion of the court.

This is an appeal from the chancery court of Oktibeha county from a judgment overruling a demurrer to the bill; an appeal being granted to settle the principles of the case. The appellant Henderson Harris was formerly owner of the land in controversy, and conveyed to Horace Byers, father of the appellee, the tract of land described as "all of the land lying east of the Starkville & Macon Road containing forty acres, more or less, and known as the fractional southwest quarter of the southwest quarter of section 33, township 18, range 15." Afterwards Horace Byers conveyed to the appellee, Henry Byers, "the land described as the north end of fractional southwest quarter of southwest quarter of section 33, township 18, range 15, containing four acres, with the house on it." At the time of the first conveyance there was a deed of trust given by Henderson Harris on the above lands, which were afterwards sold, and one D. A. Saunders purchased at the trustee's sale, and afterwards sold to Henderson Harris and his wife, Sarah Harris. Sarah Harris is the daughter of Horace Byers, and after his death took possession of the property conveyed to Horace Byers by Henderson Harris, and was in possession at the time the suit was brought, and, the bill alleges, had been for about eight years. The deed from Henderson Harris to Horace Byers was a warranty deed. The bill prays for a cancellation of the claims as against the appellee's four acres of land, and for an accounting for rents during the eight-year period in which the appellants have been in possession. The bill also sets out that Sarah Harris and Henderson Harris bought from D. A. Saunders the property in question, did not pay anything for the same, and that Sarah Harris was made a grantee for the purpose of depriving the appellee or the complainant of his right and title to the land. The appellants demurred to the bill on the ground principally that the

bill did not show perfect title in the complainant and that the deed by which complainant claims title is void upon its face, and that the bill states no cause of action. The main reliance of the appellants to secure a reversal is that the deed is void.

The description of the deed from Horace Byers to Henry Byers is good. See *Selden v. Coffee*, 55 Miss. 41; *Swan v. Union Mortgage & Security Co.*, 75 Miss. 912, 23 So. 627; *Goodbar v. Dunn*, 61 Miss. 618.

Henderson Harris conveyed warranty title to Horace Byers, and, there being at the time of said warranty an outstanding deed of trust through which he now claims title, and having obtained title subsequent to said conveyance through said deed of trust, the title so acquired operates to his grantee and his assignees.

If Horace Byers did not own the entire north end of the southwest quarter of the southwest quarter, his conveyance of four acres off the north end of said subdivision would operate to carry four acres of land off the north end of whatever land he owned in said subdivision.

It follows from the foregoing that the judgment of the chancellor is affirmed, and the cause is remanded for further proceedings.

Affirmed and remanded.

CAULK v. BURT.

[73 South. 618, Division B.]

1. WILLS. Probate. Custodian. Duty to produce.

A party having the possession of a will after the death of the testator is a trustee only to the extent that he is the custodian of the will and his duty only extends to producing the will and having it probated.

2. *DEEDS. Incapacity. Negligence.*

Where a devisee under a will which was in the custody of another party, saw such will and had full opportunity to familiarize himself with its contents, but failed to read the will through, before deeding to the party having the custody of the will, his interest under the will, and such devisee at the time of making such deed was not drunk or incapable of transacting business, he could not complain of his own negligence in not learning of his interest under the will to set aside and cancel his deed.

3. *DEEDS. Drunkenness of Grantor. Evidence.*

Under the facts set out in the opinion, the court held in this case that the evidence was not sufficient to show that complainant was drunk when he executed the deed to his interest as devisee under the will.

APPEAL from the chancery court of Bolivar county.
HON. JOE MAY, Chancellor.

Bill by S. V. Caulk against James A. Burt. From a judgment for defendant, complainant appeals.

The facts are fully stated in the opinion of the court.

Tim E. Cooper, B. J. Semmes, and A. D. Somerville,
for appellant.

Fontaine Jones and Green & Green, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

The appellant filed a bill in the chancery court of the first district of Bolivar county against James A. Burt to set aside a deed made by the appellant to James A. Burt of his entire interest in the estate of Mary E. Snipes. The bill alleges that on or about the 18th day of July, 1913, Mary E. Snipes died testate, leaving certain lands in Bolivar county which are set forth and described in the bill, and that he was the sole heir at law of Mary E. Snipes and inherited all property not disposed of in the will which is set out at length in the bill, and that in the will she also left him a pension of twenty-five dollars per month during his natural life

to be charged upon property described in the will; that said will was in the custody of Burt at the time of the deed, but since had been probated, and that Burt fraudulently and falsely represented to the complainant that all that he would receive under the will was a pension of twenty-five dollars per month and that he offered to pay two thousand dollars for the interest of the complainant in said estate, both real and personal, and to pay all said amount in cash if complainant would discount same two and a half per cent.; and that complainant, relying upon said representations, and being ignorant of his rights and of the contents of said will, except that he was to receive twenty-five dollars per month during his life, accepted the proposition. He alleges further: That for a long number of years complainant had been an habitual user of intoxicants and habitually drunk, and that his passion for strong drink was entirely beyond his control, and had been for many years, and that by reason of the excesses that his mental faculties and perception had been greatly impaired and his power of discretion practically passed away, and that while under the influence of liquor he had absolutely no business discretion and no control over himself and no power to resist money with which to procure further drinks; and that these facts were well known to the defendant. That, after the death of Mary E. Snipes, the complainant being without funds with which to go to Mississippi, Burt loaned him a small amount of money to defray his expenses to Rosedale, Miss., which was the domicile of the estate of Mary E. Snipes. That, while the complainant was in Rosedale on said trip without funds except as loaned by Burt and without any one to advise him as to his rights in the premises, the complainant secured lodging at a hotel, and while there partook of whisky and became intoxicated, and that while he continued in Rosedale he continued to drink and remain under the influence of liquor, and that during the time he was incapable of exercising

business sagacity the defendant made the trade and procured the deed to the property. That the property deeded was worth more than thirteen thousand dollars, but that the price received for it was one thousand, nine hundred fifty dollars, which he tenders back to the defendant with his bill.

The will contained, among other things, a provision willing the Lovinggood place to Mrs. N. M. Rice and Mrs. J. J. Booker and making a disposition of the personal property to Josie Burt, Annie Booker, and Mary Rice, charged with certain legacies and funeral expenses. The deed contains a description of the property and conveys all right, title, and interest in the estate of Mary E. Snipes, deceased, including real, personal, and mixed property, accounts, and choses in action. There is proof in the record that Caulk, the complainant, was addicted to the use of intoxicating liquors, and when drinking was imprudent and careless of money matters; and proof that he had no business capacity at such times. The complainant testifies that, when he went to Rosedale to see about the estate, the defendant showed him the will, but that he did not read the entire will and only read the part giving him twenty-five dollars per month, and that when he signed the deed he thought he was only signing away his right to the twenty-five dollars per month and not signing away anything else. Burt, the defendant, testifies that complainant read the will over two or three times, and that he did understand what he was conveying, and that his reason for accepting less than the value of the property was that the will conveyed certain property to Mrs. Rice and Mrs. Booker, and that this property had been sold and the proceeds invested in other property, and that Mrs. Rice and Mrs. Booker would claim this property purchased with the proceeds of the Lovinggood place as their property, and that Rice would lawsuit him as long as he lived about the property, and that he would never get any benefit from

it as he was then sixty-nine years of age. The testimony shows that the property was worth from eight thousand dollars to ten thousand dollars after the incumbrances would be paid off. D. Reinach, who, so far as the record shows is disinterested in this suit, corroborated Burt's testimony as to what took place, and that the complainant had full knowledge of the contents of the will, having read it at least three times, and testifies to various conversations and statements showing that the complainant knew what he was doing, and testifies that he was not drunk and was not drinking so far as he could tell. Fontaine Jones, an attorney of Rosedale, also testified that he drew the deed for the parties, and that complainant was at his place several times during his stay in Rosedale and discussed the sale after the deed was signed, expressing himself as being satisfied with the trade made, and that Caulk said that, while the property was sold much below its actual value, he thought it was a good bargain, because he was old and there would be litigation over it which would deprive him of getting any value from the estate other than the twenty-five dollars. There were others who testified to seeing the complainant in Rosedale during this period of time who testified that he was not drunk or under the influence of liquor so far as they could tell. The decree below was for the defendant, the chancellor dismissing the bill and denying relief.

It is insisted in the argument here that Burt was a trustee, and that, being a trustee and the property having been sold for much less than its real value, the decree below was error. Burt was the trustee only to the extent that he was the custodian of the will in question, and his duty only extended to producing the will and having it probated. He was under no other obligation to the appellant in this case, and the proof shows that he did produce the will, and, while the will had not been probated at said time, still the complainant was permitted to read the will and learn its provisions. It does not

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Brief for Appellant.

appear that the complainant desired to take a copy of the will, or that he requested that it be probated, nor that he requested the privilege of taking the will to take legal advice as to his rights. If the will was produced and he had an opportunity of familiarizing himself with its terms and failed to read the will through before making a deed, and if at the time he was not drunk or incapable of transacting business, he cannot complain of his own negligence in the matter. Witnesses for the complainant testify that when he is not drunk he had good business capacity, but when he was drunk that he had no business capacity. The weight of evidence in this record shows that he was not drunk at the time of this transaction. The complainant is contradicted by several parties as to his condition during this time, and the chancellor, who had all the facts before him, was better able to judge of the veracity and credibility of the witnesses than we are, because he was familiar with the parties and the surroundings, and we are unable to say that the chancellor was manifestly wrong; and the judgment is, accordingly, affirmed.

Affirmed.

JOHNSTON STATE REVENUE AGENT v. BROWNS.

[73 South. 721, Division A.]

1. COUNTIES. *Compensation of offices. Auditor. Statutes. Construction.*

Under Code 1906, section 2206, providing that in counties having two judicial districts the officers may be allowed the compensation therein provided for each district, it was the intent of the legislature, that this section should apply to all county officers in the allowance of compensation for their services in counties

composed of two judicial districts. The language "compensation herein provided," as used in this section was not intended to be limited to the compensation allowed as fees to those officers named in Chapter 49, Code 1906.

2. **SAME.**

In arriving at the spirit and intent of a statute of this kind, it is proper to take into consideration any other statutes in the code relating to the same subject, and if material to each other they should be construed together consistently and harmoniously if possible as one scheme, in order to ascertain the true intent of the legislature in dealing with that particular subject.

3. **SAME.**

Section 2206, Code 1906 applies to the compensation allowed to county auditors by section 348, Code 1906 and the board of supervisors in counties composed of two judicial districts have the lawful authority, within their discretion to allow the fixed compensation for each district of such counties.

APPEAL from the circuit court of Jasper county.

HON. W. H. HUGHES, Judge.

Suit by J. C. Johnston, state Revenue Agent, against T. Q. Brame. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Frank T. Scott, for appellant.

The only question that is squarely presented in this case for this court to decide is whether the word "herein" in section 2206 in the chapter on fees in the Code of 1906, was intended by the legislature to apply to the whole Code or was it intended to be limited to the chapter in which it is used.

Appellee discusses very learnedly the rules of construction and shows beyond a question, what had not been denied, that the intent of the legislature shall prevail. But what does he do to show that it was the intent of the legislature that county auditors in double district counties should draw for each district of the county the maximum amount of salary provided by law for the whole county?

The most that he does is to make the bare assertion that it is apparent to him that the legislature must have intended to provide extra compensation for the extra work required and he does not even show or attempt to show that it was the intent of the legislature that county auditors in double district counties should draw for each district of the county the maximum amount of salary provided by law for the whole county?

The most that he does is to make the bare assertion that it is apparent to him that the legislature must have intended to provide extra compensation for the extra work required and he does not even show or attempt to show that there was any extra work required. He calls attention to two later acts of the legislature, one being chapter 206 of the Laws of 1904, which provides that the board of supervisors of Choctaw county may pay Jesse Hughes, as county auditor, for each district of the county, and the other being chapter 145 of the Laws of 1916, in which all payments and allowances to clerks as county auditors, in counties having two judicial districts, are validated and declared lawful.

I respectfully submit that neither of the above enactments can aid in the solution of the question before the court, unless, indeed, they tend to show that there is no general law under which county auditors can draw the pay of which complaint is made. The act empowering the board of supervisors to give extra pay to Jesse Hughes throws no light on the subject. If it be regarded as an enabling act then it shows that those who secured its passage realized that there was no general law by which it could be drawn. If the legislature was attempting to construe the law then it was assuming a prerogative that is given by the constitution to this court exclusively. To anyone who has any knowledge of the ease with which local measures of this nature can be literally shoved through the legislature, the idea is almost absurd that from them can be ascertained the

intent of the legislature in regard to some important question. Then, too, I desire to call attention to the fact that this local measure was passed in 1904, just ten years after the last legislation in regard to the salary of the county auditor, it having been in 1894 that his salary was placed on a graduated basis.

It is equally true that chapter 145 of the Laws of Mississippi of 1916, can throw no light on the question at issue, for more obvious reasons than those mentioned in the preceding paragraph. In the first place, it is clearly unconstitutional, being violative of section 100 of the Constitution as shown in my original brief. Certainly an unconstitutional act of the legislature cannot be construed to indicate what was intended by a law which was enacted twenty-two years prior to the unconstitutional expression. Then, too, if, appellee, and the other auditors involved thought that by the law as it already stood they were entitled to the money which this suit was instituted to recover, why did they consider it necessary to go to the trouble and expense of lobbying this bill through the legislature? If they felt that the law was as plain as counsel for the appellee now contends it is, why this extra expense and trouble? Certainly they did not think that with public opinion so openly denunciatory of the revenue agent as it was at that time that the courts would be prejudiced against them.

Appellee calls attention to the fact that by sections 2177 and 2171 of the Code the sheriff and circuit clerk for certain services mentioned in said sections, are entitled to draw double pay in double district counties. It will be noted, however, that in every case where such provision is made it is clear that in each district of the county they have exactly the same duties to perform. I shall show later that this is indicative of the fact that the legislature did not intend that county auditors should draw double pay in double district counties.

Having shown that none of the arguments advanced by the appellee with a view to showing the intent of

the legislature in regard to this question will bear analysis, I desire now to state briefly my reasons for saying that the legislature did not intend that county auditors in double district counties should draw the double pay in question.

Several of the authorities cited by appellee are authority for the statement that one of the best means of ascertaining the meaning and intent of a statute law is to trace its history, and see under what circumstances it was passed.

As stated in my first brief, section 54 of chapter 83 of the Laws of 1892, creates the office of county auditor and provides that the clerk of the board of supervisors shall be said officer. Section 55 of said chapter fixes his salary and provides that in no case shall it exceed five hundred dollars per annum. The following sections prescribe his duties. By chapter 40 of the Laws of 1894, section 55 of chapter 83 of the Laws of 1892, was amended and the salary of the county auditor was placed on a graduated basis based upon the assessed valuation of each county.

Now, if the legislature had intended that in double district counties this officer should receive twice the amount provided for why did it not say so? It would have been the easiest thing in the world to have done so and certainly if it had had any such intention it would have done so. When this law was passed the Code had not been made and the previous Code did not contain the little section providing that the compensation "herein" provided should be paid in each district. Suppose, then, our laws had not been codified. In that case, according to appellee's contention, he would have been deprived of what he now maintains he is entitled to by the mere accident of a non-codification of our laws. Then at the time the legislature inserted the little double district county provision in the chapter on Fees, if it had intended for it to embrace the salary of the county auditor provided for in a different chapter, why did it not

take the precaution to say so or to amend the section in the chapter on boards of supervisors in which the salary of the county auditor is fixed? It certainly could not have expected that everybody would have taken the provision to apply to the salary of the county auditor.

It is significant that in every instance where it is clear that there are double duties to perform by reason of a double district county, the legislature has specifically provided that in case of a double district county, double the amount provided should be allowed. Thus we find that section 2171 in the chapter on "Fees" relating to circuit clerks, section 2177 in the same chapter and relating to the sheriff, and 2196 in the same chapter relating to tax-collector all make such provisions. The reason is clear. These sections were all passed at different times and when they were brought forward in the Code they were copied as originally passed. Thus we see that it was the policy of the legislature in fixing the salary of the various county officers whenever it was prescribing duties that would really entail double work in case of a double district county to also provide for double pay. In the case of the county auditor, however, I have already shown that no double work is required. Consequently, no double pay is provided.

Deavours & Hilburn, for appellee.

The contention of appellant is, as we understand it, simply as follows: That the word "herein," mentioned in section 2206 of the Code, is a word of limitation, and refers to chapter 49 on Fees, and not to chapter 17, Board of Supervisors, where section 348 appears, prescribing the salary of the county auditor.

In other words, appellant claims that no provision is made for paying clerks as county auditors, in counties having two judicial districts, for extra services as such. Appellant argues that inasmuch as section 2206 in the chapter on Fees, might have been adopted at an

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entirely different time from section 348 under Board of Supervisors, that the word "herein" refers only to the chapter on Fees. He cites some authorities in other states, in support of this proposition. However, it will be noticed that he does not cite a single authority from the courts of this state.

On the other hand, the supreme court of this state has expressly decided, in two well-considered cases, which we will mention later, that where statutes are to be construed that all the provisions of the Code will be construed together. If we are correct in this, then we submit, the question at issue will be easy of solution. Taking the Code as a whole, and the acts of the legislature passed since the adoption of the Code of 1906, it is easy to observe the manifest intention of the legislature that clerks, as county auditors in counties having two judicial districts, shall receive pay for services as such for each of said districts as if each were a separate county.

In the construction of these statutes, what cardinal rules must we, therefore, keep in mind? In the construction of statutes, the intention of the legislature is the cardinal rule of construction; and the intention of the legislature is to be deduced from the whole and every part of the statute taken together; and a construction contrary to natural justice and equity will be rejected, unless the language does not admit of a different construction; and in construing a statute, the object is to get at its spirit and meaning; the courts will look to the intention of the legislature, and construe according to the spirit of the statute, although, in some measure, it may conflict with the letter. *Planters Bank v. State*, 6 S. & M. 628; *Grand Gulf Bank v. Archer*, 8 S. & M., 151; *Green v. Weller*, 32 Miss. 650; *Eskridge v. Magruder*, 45 Miss. 294; *Bonds v. Greer*, 56 Miss. 710; *Adams v. Yazoo R. Co.*, 75 Miss. 275; *Ingraham v. Speed*, 30 Miss. 410; *Read v. Manning*, 30 Miss. 308.

A statute must receive such construction as will, if possible, make all its parts harmonize with each other, and render them consistent with its scope and object. *Ellison v. Mobile & Ohio R. R. Co.*, 36 Miss. 572.

In construing a statute, the evil sought to be remedied must be kept in view; if not violative of a plain provision, it must be made to accomplish the purpose intended. *Moore v. Rowe*, 53 So. 626; *Pattison v. Clingham*, 93 Miss. 310.

All statutes on the same subject-matter, are to be construed together, and a harmonious interpretation adopted, if practicable. *Scott v. Searle*, 5 S. & M. 25; *Grand Gulf Bank v. Archer*, 8 S. & M. 151. A series of acts upon the same subject are to be construed as a whole. *White v. Johnson*, 23 Miss. 68.

All statutes relating to the same subject, must be taken as one system and construed consistently, if this can be done. *Eskridge v. Magruder*, 45 Miss. 294; *Clements v. Anderson*, 46 Miss. 581.

In order to ascertain the intention of the legislature all acts "*in pari materia*" are to be taken together and compared. *Swann v. Buck*, 40 Miss. 268. Appellant cites the case of *Fitzgerald, et al. v. Grummell, et al.*, 64 Iowa, 261, the other case in support of his contention that the word "herein" in section 2206 refers only to chapter 149 of the code of 1906.

We submit that under the rules of construction announced by the courts of this state, the Code is to be regarded as a whole, and every statute relating to the point in controversy, shall be examined to ascertain, if possible, the legislative intent.

This doctrine is clearly and forcibly announced in the celebrated case of *Gibbons, et al. v. Brittenum, et al.*, 56 Miss. 232; *Lombard v. Lombard*, reported in 57 Miss. 171. Sections 348 and 2206, were both brought forward in the Code of 1906; both went into operation on the same date, and were intended to form parts of a harmonious Code of Law.

Section 2, Code of 1906, provides: "The said chapters, except as expressly provided, shall take effect on the first day of October, 1906, and from that date this Code shall be received in use, and shall supersede all prior statutes and clauses therein revised, and hereby repealed."

Thus, all the provisions of the Code were adopted at the same time, and for the reason ably stated in the opinion of the court, set out more fully above, they are to be construed together. And in our opinion, section 348 of the Code is to be treated exactly as if it had been placed in chapter 49 of the Code. If our contention is correct in this, then the matter at issue is easy of solution.

HOLDEN, J., delivered the opinion of the court.

The appellant, J. C. Johnston, state revenue agent, entered suit in the circuit court of Jasper county against T. Q. Brame, appellee, claiming in his declaration that appellee Brame was indebted to Jasper county in the sum of one thousand, four hundred dollars, which amount was alleged to have been unlawfully allowed and paid to appellee Brame by the board of supervisors of said county as compensation for his services as county auditor for the years 1912, 1913, 1914 and 1915. The defendant Brame in the court below filed a plea of general issue to the declaration, and also filed the following special plea:

"Comes the defendant, T. Q. Brame, in the above-styled suit, and, for a special plea in this behalf, says that the plaintiff ought not to have and recover anything by his said suit, for this defendant says that during the years 1912, 1913, 1914, and 1915 he, this defendant, was chancery clerk of Jasper county, Miss., and that by virtue of section 347 of the Code of 1906, was county auditor during the said period of time; that this defendant performed the duties of county auditor of Jasper county, Miss., during the said years of 1912,

1913, 1914, and 1915, in strict accordance with the law; that the legislature of the state of Mississippi in the year 1906 passed an act dividing the county of Jasper into two circuit and chancery court districts (chapter 168 of the Laws of Mississippi of 1906), which law was in force and effect during all the years mentioned above, and is still in force and effect; that on account of the fact of the creation of the two judicial districts in said county it became the duty of this defendant, as county auditor during said time, and this defendant did, as the law directs, keep the books of said county and perform the duties as auditor for each of said district of said county as if each district were a separate county; that this defendant, by virtue of the provisions of section 2206 of the Code of 1906, was paid the same compensation allowed by law for his services as county auditor for each district of said county; that during said time the assessed value of the real and personal property of Jasper county was during all of said years more than three million dollars, an amount that would entitle the defendant to receive the sum of three hundred dollars per year for services as auditor for each district of said county; that this defendant received said amount, and no more. And this the defendant is ready to verify."

The plaintiff below demurred to this special plea of defendant, alleging one ground of demurrer, to-wit: "The plea does not state a sufficient defense in law." The demurrer was heard and overruled by the circuit judge, from which judgment the appellant Johnston, state revenue agent, appeals to this court.

It appears from the record in this case that Jasper county has two judicial districts, which fact necessitates additional work on the part of a county auditor. The board of supervisors of Jasper county in 1912, acting under section 2206, Code of 1906, which reads as follows:

“Counties Having Two Judicial Districts.—In counties having two judicial districts the compensation allowed clerks, sheriffs, and other officers shall be paid out of the county treasury; such officers may be allowed the compensation herein provided for each district”—allow the appellee Brame, as county auditor, the sum of three hundred dollars per annum for his services in each judicial district, making a total allowance of six hundred dollars per annum, as compensation for his services for the entire county composed of two judicial districts. It is admitted by the demurrer to the special plea of appellee that the assessed valuation of the property of the county exceeded three million dollars, and that therefore three hundred dollars would have been the proper compensation to be allowed to the county auditor under section 348 if there were not two judicial districts in the county; but it appears that, there being two judicial districts in the county, the board of supervisors, believing that they had authority under said section 2206, to be used within their discretion, to allow double compensation in counties having two judicial districts, made the allowance of six hundred dollars per annum to the appellee under the said sections 348 and 2206, Code of 1906.

The opposing contentions of counsel for the appellant and appellee are clearly presented here. The appellant earnestly contends that section 2206 of the Code does not apply to the compensation to be allowed to county auditors, but that section 348, Code of 1906, is the sole authority for fixing the salary or compensation of county auditors, and that it limits in its terms the compensation to be allowed, based upon the assessed valuation of the property of the county, and that a county auditor can be allowed no more than is fixed and prescribed by the said section 348, Code of 1906. The appellee contends that, while section 348 fixes the amount of compensation to be allowed to the county auditor, on a basis of assessed valuation of property in the county,

still this section did not contemplate the compensation to be allowed in counties with two judicial districts, but that section 2206 authorizes the board of supervisors, in their discretion, to allow the prescribed compensation for each district. In other words, it authorizes the board to allow double compensation in counties in which there are two judicial districts, which necessitates double work, or at least imposes additional work on the county auditor. The appellant contends that section 2206, which provides that "officers may be allowed the compensation herein provided for each district," does not apply to the question of compensation as to county auditors as mentioned in said section 348, but that it is intended to cover only such compensation as is mentioned in chapter 49, Code of 1906 (the chapter on fees); that the language, "compensation herein provided," refers to the compensation provided in this chapter 49, of which section 2206 is a part. The appellee answers this contention of appellant by urging that the word "herein," as used in section 2206, means and refers to any other section in the Code dealing with the same subject, and that it refers to said section 348, as that section fixes and prescribes the salary of the county auditor, and that section 2206 provides that the supervisors may in their discretion allow double compensation to a county auditor in those counties that are composed of two judicial districts.

In construing section 2206, as to its meaning and scope, we are clearly of the opinion that it was the legislative intent that section 2206 should apply to all county officers in the allowance of compensation for their services in counties composed of two judicial districts. The language, "compensation herein provided," as used in section 2206, was not intended to be limited to the compensation allowed as fees to those officers named in chapter 49, Code of 1906. In arriving at the spirit and intent of a statute of this kind, it is proper to take into consideration any other statute in the Code relating

to the same subject, and if material to each other they should be construed together consistently and harmoniously, if possible, as one scheme, in order to ascertain the true intent of the legislature in dealing with that particular subject. *Clements v. Anderson*, 46 Miss. 581; *Eskridge v. McGruder*, 45 Miss. 294; *Swann v. Busk*, 40 Miss. 268. In the latter case above, this court said:

“It is to be inferred that a Code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is therefore an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law, and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view.”

In *Gibbons v. Brittenum*, 56 Miss. 232, this court said:

“But these several enactments are not separate and distinct statutes. They are parts of a Code, and several statutes, chapters, and sections of which, though adopted on different days, went into operation on the same day, and were intended to form parts of a symmetrical and harmonious whole. We must not treat them as distinct enactments, speaking the will of the lawgiver at different times, but, if practicable, as declarations uttered *uno flatu*, by which was established by a single utterance the entire statute law of the state. The Code, in short, is to be treated as a single statute of many sections, and, if possible, those sections are to be made harmonious. What effect will this view have upon the sections under consideration? It will authorize us to look through the entire work, for the purpose of gathering all the assistance possible from a complete survey of it. This is the only aid to be derived by considering the apparently conflicting sections as parts of a whole, rather than as statutes *in pari materia*, adopted at

different periods; because, in construing this last class of statutes, where there are no repealing words in those last adopted, we are compelled to inspect them all, and, if possible, make them harmonious."

We think section 2206, Code of 1906, applies to the compensation allowed to county auditors by section 348, Code of 1906, and that the boards of supervisors in counties composed of two judicial districts have the lawful authority, within their discretion, to allow the fixed compensation for each district of such counties. In view of the above conclusions, it is unnecessary for us to notice chapter 145, Laws of 1916.

The judgment of the lower court is affirmed, and the case remanded.

Affirmed and remanded.

BROWN LAND COMMISSIONERS ET AL. v. H. B. & EUGENE
FORD.

[73 South. 722, Division B.]

1. TAXATION. *Tax title. Judgment. Conclusiveness. Void tax sale. Actions. Presentation of claim. State's liability to suit. Venue.*

Where in an action under Code 1906, section 2927, to confirm a tax title conveyed by the state there was a decree declaring the purchasers title void, such a decree would justify the presentation to the auditor of a claim for the purchase money and if the auditor should refuse to issue a warrant in payment of the claim thus presented then, and not until then, could the purchaser under section 4800 of the code institute a suit against the state.

2. STATES. *Actions. Liabilities to suit.*

A suit against the land commissioner to recover the purchase price of a tax title subsequently declared void is really an action against the state, in its sovereign capacity and is controlled by section 4800, of Code 1906.

3. SAME.

Under section 4800, Code 1806, requiring suits against the state to be brought in the court having jurisdiction of the subject matter which holds its session at the seat of government, an action against the state to recover the purchase price of a void tax title was improperly brought in Wilkerson county.

4. TAXATION. *Void tax title. Actions. Statute.*

Under section 4801, Code 1906, so providing, a bill to recover from the state the purchase price of a void tax sale cannot be taken as confessed.

Appeal from the chancery court of Wilkinson county.
HON. R. W. CUTLER, Chancellor.

Suit by H. B. & Eugene Ford against M. A. Brown, Land Commissioner and the state of Mississippi. From a decree for plaintiff against the state, the defendants appeal.

The facts are fully stated in the opinion of the court.

George H. Ethridge, Assistant Attorney-General, for appellants.

Ackland H. Jones, for appellees.

STEVENS, J., delivered the opinion of the court.

This appeal is prosecuted by the state of Mississippi and M. A. Brown, land commissioner, from a decree of the chancery court of Wilkinson county awarding a judgment against the state in the sum of fifty dollars for the purchased price of certain land described in the bill, title to which had failed.

Appellees, as complainants in the court below, exhibited their bill in chancery against M. A. Brown, land commissioner, charging the facts following: That in the year 1903 the state, through its land commissioner, conveyed as forfeited tax land to W. H. Black the north-west quarter of section 26, township 2, range 1 west; that the consideration for the patent was fifty dollars;

that Mr. Black, the vendee, conveyed the lands to complainants H. B. & Eugene Ford; that the complainants had before that time in the year 1912 filed a bill in the chancery court to confirm their tax title, and in doing so made the state land commissioner a party defendant; that this first suit was styled "*Eugene Ford et al. v. Henry R. Keller et al.*," being No. 832 on the docket of the said chancery court; that on the hearing of said cause the tax title conveyed by the state was held to be void, being based upon a void assessment made under what is known as the "Madison Act." The prayer of the bill in the present suit is that upon final hearing the complainants be granted a decree "requiring the said state of Mississippi to pay to them the amount of said purchase money with interest and all costs herein." A demurrer was interposed to this bill and by the court overruled. Appellants having declined to answer, complainants applied for and were granted a decree *pro confesso*, and final decree was entered upon the bill of complaint and decree *pro confesso*. This final decree that the complainants "do have and recover of and from the state of Mississippi the said sum of fifty dollars so paid for said land, with six per cent. interest thereon and all costs of this suit." The complainants relied in the court below upon and attempted to justify the relief awarded under section 2927, Code 1906.

This suit is prosecuted without authority of law. It is not a suit to confirm or try title. In the first suit filed by appellees the land commissioner appears to have been made a party defendant, and in that suit the question of the failure of title was determined, and a decree was entered declaring the tax title to be void and of no effect. The prosecution of the first suit was expressly authorized by section 2927 here relied on, and the decree in that case finally adjudicated the invalidity of appellee's title. The decree there rendered would justify the presentation to the auditor of the claim for the purchase money, and if the auditor should refuse

to issue a warrant in payment of the claim thus presented, then, and not until then, could appellees under section 4800 of the Code institute a suit against the state. *Gulf Export Co. v. State et al.*, 73 So. 281 (decided December 23, 1916).

While the present action purports to be a suit against the land commissioner, the decree is against the state in its sovereign capacity, and such proceeding must be controlled by section 4800 of the Code. Appellees fail to state a case under the last-named section, sued in the wrong county, and the bill was taken as confessed contrary to section 4801. It necessarily follows that the decree of the court below should be reversed, and a decree entered here dismissing the bill.

Reversed, and decree here for appellants.

Reversed.

ETHRIDGE, J., having briefed this case for the state, took no part in the decision.

FIRST NAT. BANK OF COMMERCE *et al.* v. DONALD.

[73 South. 723, Division A.]

ALLOWANCE TO WIDOW. Priority. Judgment lien.

The right of a widow to the allowance of one year's provision from the estate of her deceased husband given by section 2052, Code 1906 is superior to the lien of a judgment creditor of her husband although such judgment was enrolled before her husband died.

APPEAL from the chancery court of Forest county.
HON. Allen THOMPSON, Special Chancellor.

Bill by Dr. J. D. Donald, administrator, against the First National Bank of Commerce and others to have converted into money property left by decedent in order

to pay the widow's allowance. From a judgment overruling the demurrer of the bank to the bill, it appeals.

The facts are fully stated in the opinion of the court.

Stevens & Cook, for appellant.

We have no quarrel with counsel about the cases holding, that as between the widow and the common creditors of the deceased, the years allowance is preferred. All the cases cited by counsel along this line are cases in which no lien, judgment or otherwise, was involved. These cases throw no light on the question in the case at bar.

On page 3 of his brief opposing counsel says: "Opposing counsel do not question the right of appellee to sell the land and pay the year's allowance if in fact her claim is now exempt from the judgments." This is erroneous and misleading. This is not a contest between a judgment creditor and the widow over the common funds of the estate. The contest is between the judgment lien of the judgment creditor against specific property, and the statutory allowance provided to be paid to the widow out of the estate. This error of counsel is fundamental. Once eliminate from the equation the matter of the judgment lien which subsisted against specific real estate at the time of and before the death of Mitchell, and there is no difference between a judgment creditor and any other creditor, except as to the mere form in which the indebtedness is evidenced. It is the fact that the bank had a lien given by law upon specific real estate which entitles the bank to claim that real estate. It is an *in rem* right which we are contending for—the enforcement of a judgment lien against specific property not exempt by law to the deceased or his heirs.

The case of *Barber v. Ellis*, 8 So. 390, 68 Miss. 172, simply holds that the allowance provided by statute can be asserted only by resident citizens. No lien was involved in that case. It is to be remembered that the property on which the judgment liens of appellant attached was not exempt property while Mitchell lived and that before he died he conveyed or obligated him-

self to convey by warranty to Austin most of the real estate in question and that when his conditional sale of the property to Austin was made the judgment liens of the bank rested upon the property. The death of Mitchell could not operate to invalidate these liens on property not exempt. These judgment liens are as much valid against the widow as they are against the purchaser, Austin. Austin cannot take the property except subject to the bank's judgment lien. Certainly the widow is in no position to claim, as exempt, property which her husband sold or obligated himself to sell by warranty. Nor can she justly claim the proceeds of the sale without recognizing her husband's out-standing warranty of the title. She cannot protect that warranty without permitting the purchaser to pay off the judgment liens of the bank which were out-standing when her husband sold the land. It is the policy of the law to encourage honesty before generosity.

The rights of the purchaser, Austin, enter into a correct decision of this case. Can the widow claim as exempt, property which her husband conveyed or obligated himself to convey to Austin? Can Austin take the property so conveyed, except subject to the bank's judgment liens? If Austin is entitled to a clear title to the land under his contract with Mitchell, he should be permitted to apply the payments on the purchase price of the land toward the extinguishment of the judgments which constitute a lien upon the property conveyed, because the bank could otherwise have the land sold under the judgments. A consideration of the rights of Austin demonstrates the fallacy of opposing counsel's contention that the year's allowance operates to dissolve all liens.

Jno. T. Haney, for appellee.

This court has uniformly placed a liberal construction upon section 2052; this section was designed for

the protection of the widows and orphans of the state and this court, has as we believe, in every instance placed that construction upon it and this construction has been placed upon it, regardless of the solvency or insolvency of the estate.

In the case of *Samual McNulty etc. v. Martha N. Lewis*, 8 Smeed & Marshall, page 520, this court said (page 526): "It is a donation by law. It is also a privilege claim of the widow and children, and is not dependent upon the solvency of the decedent's estate." The case of *Whitehead et al. v. Kirk*, reported in 64 So. page 658, holds to the same effect.

In the case of *Nancy Morgan v. Ephriam Morgan*, 36 Miss. 348, this court said, among other things: "The allowance is a right, to which the widow is entitled under the statutes, to be paid out of the funds or property in the hands of the administrator, at all events, and whatever may be the condition of the estate, whether solvent or insolvent, testate or intestate." See, also, *Turner v. Turner*, 30 Miss. 428.

While the question of exemption was not raised in the foregoing authorities yet it will be seen from the reading of these authorities that this court has given to section 2052 the effect of an exempt statute. We are not required, however to base our contention that the year's allowance to the widow of deceased is a part of our exemption law upon inference for this court has expressly held in the case of *Barber v. Ellis*, 8 So. 390, 68 Miss. 172, that: "The section must be held to be a part of our exemption laws, and applicable only to persons resident within our borders."

In view of the foregoing we respectfully submit to this honorable court that section 2052 is a part of our exemption laws; that to give it any other interpretation would destroy the beneficent purpose for which it was enacted. We will, therefore, base the remainder of our argument upon the assumption that this law is a part of our exemption laws.

The exemption laws of this state, as we understand them, were never designed to operate against contract liens when the liens were properly contracted, but to exempt the property from execution and attachment; that is to say to exempt it from those liens which are created not by the act of the debtor but by act of law, and judgments fall within this class. The very purpose of the law for exemptions to prevent the execution of the lien given in code section 819 in so far as that lien effects the exempt property. But for judgment liens and attachments our exemption laws would be useless. The exemptions must be written in section 819 otherwise when exempt property was levied upon under a judgment and claimed as exempt by the judgment debtor he would be confronted with code section 819 for that section declares the lien and does not expressly mention exemptions. Section 819 would embrace all property of every kind belonging to the judgment creditor but for the fact that the exemption laws of the state steps in before sale and forbids the sale of exempt property under sale of an execution or attachment. But for the special statute regulating the sale of the homestead and the exemption laws of this state the homestead of a head of a family could be sold under the lien created by section 819.

Exemption laws were enacted for the protection of the weak as well as for the protection of society in general, and it has been the policy of this court to construe all such laws liberally and to the end that their purpose might be fully accomplished.

Appellant contends that because of the fact that the judgment liens attached during the life of Dr. Mitchell and at a time when the property was not exempt that the property could not after that time be exempted from the judgments. This contention we believe is refuted by every decision of this court on that question. *William B. Trotter v. Martin Dobbs and wife*, reported in 38 Miss. 198.

This case is well in point and we invite the court's attention to the entire decision. The case of *Mary B. Irwin et al. v. A. J. Lewis*, 50 Miss. 363, holds to the same effect as the Dobbs case above cited and approves the holding in that case. *Barnes & Co. v. Buchanan*, 67 So. 462.

In this case a special lien was by decree placed against the property and after this decree the defendant married. Held: that upon the marriage of the defendant and the occupancy of the land as a homestead that it became exempt to him. This is a well-considered case by this court and goes into the question here under discussion fully and cites a large number of authorities sustaining it. We, therefore, invite the attention of this court to the entire decision. *Commercial Bank of Augusta v. Burckhalter, et al.*, a Georgia case reported in 25 S. E., page 917.

The foregoing presents the theory of this case which was presented to the lower court and is the theory of the case which was adopted by the lower court, and we confidently believe that it is the true theory of this case.

HOLDEN, J., delivered the opinion of the court.

After the death of E. J. Mitchell, the administrator, Dr. J. D. Donald, was ordered by the court to pay over to Mrs. Mitchell, the widow of deceased, nine hundred dollars "out of the effects of the decedent," as "one year's provision," under section 2052, Code of 1906. The deceased left about nine hundred dollars worth of property, and the appellee administrator seeks by bill in equity to have this property converted into money with which to pay the widow's allowance of nine hundred dollars. The appellant bank had an enrolled judgment lien upon the property of the decedent at the date of his death, but no execution had been issued thereon. A demurrer was filed by appellant to

this bill, in which it is contended that the enrolled judgment lien of appellant against the property of the decedent is superior to the right of the widow to the year's allowance out of the property left by her husband. The chancellor overruled the demurrer; hence this appeal.

The question presented to us on this appeal is whether or not an enrolled judgment lien obtained against unexempt property of a decedent prior to his death must yield after his death to the widow's allowance provided for in section 2052, Code of 1906. We have been unable to find any decision of the precise question by any court, and, having no precedent to aid us here, we must seek to find the intent of the lawmakers in the enactment of the two statutes here involved, which are in the following language:

"819 (757). *Lien of Enrolled Judgments*.—A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns, against the judgment debtor, and all persons claiming the property under him after the rendition of the judgment; and a judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled," etc.

"2052 (1877). *Appraisers to Set Apart One Year's Support for Family*.—It shall be the duty of the appraisers to set apart out of the effects of the decedent, for his widow and children who were being supported by him, or for the widow if there be no such children, or for such children if there be no widow, one year's provision, including such provision as may be embraced in the exempt property set apart; and if there be no provisions, or an insufficient amount, the appraiser shall allow money in lieu thereof or in addition thereto necessary for the comfortable support of the widow

and children, or widow or children, as the case may be, for one year," etc.

The force of a judgment lien must depend upon the statute which gives it. No execution and levy under the judgment lien having been had here, we do not hesitate to say that the lien is general, and not specific. The lien may be said to be a "recorded debt," binding the property of the defendant against him and all persons claiming the property under him after rendition and enrollment. In *Dozier v. Lewis*, 27 Miss. 679, this court, in speaking of judgment liens, says:

"It was a general, not a specific, lien. 'It is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.' Story, Eq. par. 1215. It is neither a *jus in re*, nor a *jus ad rem*, 4 Kent's Com. It confers a mere right of satisfaction out of any property of the defendant then held or subsequently acquired, which, under our laws, operated as a charge upon the property from its date, and empowered the creditor to have the property taken in execution. Any one purchasing property in this condition, of course, holds it subject to the right of the creditor to subject it to his judgment. But this right depends upon the fact that the property shall be actually taken in execution; and if that is never done, the creditor's claim is nothing more than a debt of record."

The court said in *Houston v. Houston*, 67 Ind. 276:

"This subject of the power of the legislature over the lien of judgments was considered by this court, in the case of *Gimbel v. Stolte*, 59 Ind. 446, WORDEN, J., delivering the opinion, and it was then held, as we now hold, that, as this lien is given by statute, so also it might be destroyed or taken away by legislative action."

Also in *Gimbel v. Stolte*, 59 Ind. 446, that court said:

“But a judgment creditor of an owner has no estate or proprietary interest in the land. He stands wholly upon the law, which gives him a remedy for the collection of his debt by a sale of the land under execution, in case sufficient personal property of the debtor should not be found. This remedy is not secured by contract, but is purely statutory, and in aid of it acts have been passed, from time to time, authorizing a sale of the land which the defendant owned at the time of recovery or docketing of the judgment, or at any subsequent period, and making the judgment a lien upon the land. The duration of this lien and the mode of its enforcement and discharge are subjects which appertain to the laws for the collection of debts.

“We concur generally in the views thus expressed by the court of appeals of New York. There can be no doubt that a law which gives a judgment creditor a lien on the real estate of the debtor relates solely to the remedy; and there can be no vested right in a remedy.”

Under section 819, Code of 1906, the force and extent of the judgment lien is to bind the property against the debtor and all persons claiming under him after enrollment of the judgment, but it is not superior to exemptions created by law. The lien, being a general lien, before levy of execution, is merely a charge upon the property; it is not a right in it nor to it; it is only a right of satisfaction to be had out of it.

The privilege of the widow's allowance at the death of her husband is an exemption granted by the statute, and arises immediately upon the death of the husband. It is a fixed statutory right in and to the property of the husband at his death. The statute is notice to judgment creditors that, upon the death of the husband the exemption to the widow will arise and supersede the judgment lien created by the same legislative power. The purpose and wisdom of this exemption

statute must be obvious to all. It is intended to provide against the poverty of the widow and children of the decedent. It also affects the public interests in preventing the poor and unfortunate from becoming public charges.

In *Edwards v. McGee*, 27 Miss. 92, this court said, in speaking of the widow's allowance:

It "was intended to give to the widow and children of such deceased person a clear right to one year's support out of his estate."

And the court was dealing with a case there similar to the case before us now. Whether the creditor there held a judgment lien does not appear. But the court held that the widow's allowance was superior to the rights of a creditor.

This court said, in *Morgan v. Morgan*, 36 Miss. 348:

"The allowance is a right, to which the widow is entitled under the statutes, to be paid out of the funds or property in the hands of the administrator, at all events, and whatever may be the condition of the estate, whether solvent or insolvent, testate or intestate. It is only necessary that the amount and value of the estate and the circumstances and condition of the widow and children should be taken into consideration in making the allowance; and where the amount of the estate is shown, it is a matter with which the administrator has no concern."

The holding in this last-named case clearly indicates that the widow's allowance is a paramount right as against a general lien of a judgment creditor.

In *Turner v. Turner*, 30 Miss. 428, in discussing this exemption to the widow, Justice HANDY said:

"The allowance for a year's provision stands upon different ground—that of the immediate necessities of the widow and children. It interferes with no right of disposition which the testator could be presumed to make of his property, and therefore, from its

peculiar nature, is allowed as a privileged claim upon his estate, whether he has left a will or not."

Section 2052 of the Code gives a right of exemption to the widow; that is, a right or privilege by law to have and to hold the property free from all liability to levy and sale on execution or attachment. This is what the exemption means. The judgment creditor had only a lien, with the right to subject the property under it, before the exemption arose by law. It will be observed that section 3977, Code of 1906, suspends the right of process by the judgment creditor as to estates of deceased persons, thus indicating that the exemption for the widow as provided in section 2052 was intended to intervene and supersede the rights of any judgment creditor for at least one year after the death of the judgment debtor.

The text-writers seem to announce the rule to be that the character of exemption we are dealing with in this case is such as will prevail against judgment liens, unless the statute giving the lien expressly provides otherwise. Section 2052 is held to be a part of our exemption laws. *Barber v. Ellis*, 68 Miss. 172, 8 So. 390. The decisions cited by counsel do not aid us much here, as they are based upon different statutes of other states.

After a careful study and consideration of the question here presented, we feel safe in the correctness of the conclusion that the exemption allowed to the widow is a superior right to the lien of the judgment creditor, and must have right of way over the lien of appellant in this case.

The decree of the lower court is affirmed, and the case remanded with leave to answer within thirty days from date of filing mandate in lower court.

Affirmed and remanded.

THOMAS *et al.* v. BYRD *et al.*

[73 South. 725, Division A.]

WILLS. *Character of instrument. Testament or deed.*

An instrument executed by three brothers who were engaged in the operation of a plantation owned by two of them, which provided that on the death of any one of them, "his interest, in the property was to vest in the others, subject only to his personal debts, and that in the event of the death of two of them, the property should vest in the survivor, the expressed purpose being that the business might be carried on without interruption, did not convey to any of the parties thereto any interest in the property of the others, to vest, either immediately or in the future, but the object sought to be accomplished by it was to cause whatever property each of the parties thereto might own at his death, to vest when that event should occur, in the surviving party or parties. The instrument therefore is testamentary in character, and can have no operation as a deed.

Appeal from the Chancery court of Sunflower county.
HON. E. N. THOMAS, Chancellor.

Suit to quiet title by James W. Byrd and another against Mabel C. Thomas and others. From a decree for complainants, defendants appeal.

James W. Byrd, August B. Byrd, and William G. Byrd, three brothers, all of whom were unmarried at the time of the execution of the instrument which forms the basis of this suit, were engaged in the planting business. James W. Byrd and Augustus B. Byrd were the owners as tenants in common of the land and personal property involved in this suit. Prior to the execution of this contract William G. Byrd had advanced some money to the other two brothers which was used in the improvement and operation of the plantation. All of them seem to have taken whatever money was necessary for their personal expenses out of the business without keeping any account among themselves. After the execution of the instrument referred to Augustus B. Byrd married and subsequently died,

leaving as his heirs at law his widow, Mabel C. Byrd, and an infant child, James W. Byrd, Jr. At the time of his death Augustus B. Byrd owned an undivided half interest in the property involved in this suit, and his widow and child claim it as his sole surviving heirs. The two surviving brothers, James W. Byrd and William G. Byrd, claim exclusive title to this property under the instrument hereinafter set out, and they brought this suit to quiet and confirm their title to same and cancel the claim of the widow and son of their deceased brother, Augustus B. Byrd.

The defense interposed by the widow and son was that the instrument was testamentary in character and ineffectual to pass title to the property of Augustus B. Byrd, deceased, either as a deed or a contract, and that inasmuch as it was not executed and attested as required by section 5078 of the Code of 1906, which provides that a will "if not wholly written and subscribed by the testator shall be attested by two or more credible witnesses in the presence of the testator," that therefore the property of Augustus B. Byrd passed to his widow and son by descent. On final hearing the court construed the instrument as a deed or contract, and not as testamentary, and rendered a decree confirming the title of complainants and canceling the claim of the widow and son thereto. From this decree the widow (who had subsequently married a man named Thomas) and her infant son prosecuted this appeal.

The instrument (Exhibit A) referred to in the opinion is as follows:

J. W. Byrd et al. to W. G. Byrd.

This contract and agreement, made and entered into this the 21st day of March, A. D. 1907, by and between James W. Byrd, Augustus B. Byrd, and William G. Byrd, all of whom reside at or near Isola, in the county of Washington, state of Mississippi, witnesseth:

That whereas, all of the parties to this contract are interested in certain farming and stock-raising business now being conducted on lands owned by the undersigned James W. Byrd and Augustus B. Byrd: and whereas, we each are desirous that said business shall be continued and conducted as it is now being conducted, in the event that any of us should die without such business being interfered with, or in any manner suspended or litigated in the event of the death of any of the parties:

Now, therefore, this agreement and contract witnesseth that in the event that the said Augustus B. Byrd and William G. Byrd should survive the said James W. Byrd, then the entire right, title and interest of the said James W. Byrd in all lands and other property now owned by the said James W. Byrd shall become the property of the said Augustus and William G. Byrd, who shall hold the same by fee-simple title, subject only to the personal debts of the said James W. Byrd, and should the said James W. Byrd and William G. Byrd survive the said Augustus B. Byrd, then all the right, title, and interest of the said Augustus in all lands and personal property, wheresoever situated, shall become the property of the said James W. Byrd and William G. Byrd who shall hold the same in fee simple, subject only to the individual debts of the said Augustus B. Byrd. Should the said Augustus B. Byrd and James W. Byrd survive the said William G. Byrd, then all the property, real or personal and mixed, wheresoever situated, owned by the said William G. Byrd, at the time of his death, shall become the property of the said James W. Byrd and Augustus B. Byrd, who shall hold the same in fee simple, subject only to the personal debts of the said William G. Byrd; and in the event of the death of any two of the parties to this contract, no matter when or how occurring, then the survivor shall become seised and possessed in fee simple of all the

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Statement of the case.

right, title, and interest of all the property, real or personal and mixed, which may have been owned by either jointly or severally, or by either or both of such deceased parties, subject, however, to the individual debts of such deceased party or parties; it being our intention by this contract and agreement that all of the property now held or owned either jointly or severally by the several parties to this contract shall become the property of the surviving parties, or party, whenever either or any of the parties hereto shall die, and that the business now being conducted by us shall be continued without change of the same, or without liquidation or suspension, in that same manner as if one of the said parties had died, and just as if they were all living as at this time.

Witness our signatures this the 21st day of March, 1907.

James W. Byrd.

Augustus B. Byrd.

William G. Byrd.

State of Mississippi, County of Washington, town of Isola.

This day personally appeared before the undersigned, notary public in and for the Fifth supervisor district, county of Washington and state of Mississippi, James W. Byrd, Augustus B. Byrd, and William G. Byrd, who each acknowledged that they signed and delivered the foregoing instrument of writing on the day and year therein mentioned and for the purposes therein expressed, as their own joint and several act and deed.

Given under my hand and seal of office this the 21st day of March, A. D. 1907.

[Seal.]

O. T. EDDLEMAN, N. P.

State of Mississippi, Sunflower County.

I certify that the foregoing instrument was filed for record in my office at 9 o'clock a. m. on the 22d day of March, 1907, and was duly recorded on the 22d day

of March, 1907. W. P. Gresham, Clerk, F. B. McKee, D. C. [Seal.]

Book F—3, page 266.

Filed this the 16th day of February, 1912. A. P. Stubblefield, Chancery Clerk, by L. M. Watts, Deputy Clerk.

Campbell & Cashin and *S. D. Neil*, for appellants.

If the instrument of writing presented by this record had been signed by only one of the parties, instead of by all three of them, and it spoke the same language that this jointly executed instrument speaks, it would doubtless have been construed by the court below as testamentary in its nature, and ineffectual for want of proper execution and probate; for every word in it, after reciting the preamble, as applied to each of the signers thereof, relates to the future and unequivocally shows that its provisions are not to be operative, except in the event of the death of each of said parties.

The fact that the instrument is in the form of a contract, and was signed by more than one party, does not prevent it from operating as testamentary in its nature; for, it is well established, especially by the more modern authorities, that an instrument in writing executed by several parties, may operate, and will operate, according to its terms, as a joint will, or a mutual and reciprocal will, or as the several will of the parties.

40 Cyc. page 2110, et seq; *Crawley's Appeal*, 10 L. R. A. 91; Note to *Ferris v. Neville*, 89 Am. St. Rep. 493; Note to *Robertson v. Robertson*, 136 Am. St. Rep. 592. In determining whether an instrument be a deed or a will, the main question is: Does the instrument, regardless of its form, and regardless of the number who sign it, pass a present interest? If it does, it is a deed; otherwise, it is not. *Jones v. Jones*, 16 Am. Dec. 35, and notes; *Babb v. Harrison*, 70 Am. Dec.

203; *Burlington University v. Barrett*, 92 Am. Dec. 383, and notes; *Wilson v. Carrico*, 49 Am. St. Rep. 213, and notes; 12 Cyc., page 521; 40 Cyc., page 1084; *Wall v. Wall*, 30 Miss. 91; *Exum, et al. v. Canty, et al.*, 34 Miss. 533; *Sartor v. Sartor*, 39 Miss. 760; *McDaniel v. Johns*, 45 Miss. 632; *Cunningham v. Davis*, 62 Miss. 366; Devlin on Deeds (3 Ed.), sec. 854; and many other authorities that could be cited.

In *Wall v. Wall, ubi supra*, it is said: "The determination of the legal character of instruments of this kind depends mainly upon the question whether the maker intended to convey any estate or interest to vest before his death, and upon the execution of the paper, or, on the other hand, whether all interest and estate whatever, were to take effect only after his death. For the most part, that is governed by the provisions of the instrument, which may be sometimes aided by the concurrent circumstances of its execution; and the rule is well established that whatever may be the form of the instrument or the circumstances of its execution and delivery, if, upon the whole, the intention was that it should have only a future operation after death, it must be held to be a will. And in such case, it is immaterial whether the maker call it a deed or a will; for it must, nevertheless, have that effect which the law gives to it."

The test by which to determine whether a given instrument is a deed or a will, as announced in the foregoing authorities, has been announced and re-announced and applied in this state in every case reported since the case of *Wall v. Wall, ubi supra*.

So, according to the consensus of judicial opinion, and of text writers, it matters not what the form of the instrument may be, whether in the form of a deed or contract or what the maker may call it, if, by its provisions, a present interest does not pass to the grantee or donee, it is to be construed as testamentary in its nature.

Much reliance is placed by adverse counsel upon the provisions of section 2762 of the Code of 1906, which are as follows: "Any interest in, or claim to, land may be conveyed to vest immediately, or in the future, by writing signed and delivered; and such writing shall have the effect to transfer, according to its terms, the title of the person signing and delivering it, with all its instruments, as fully and perfectly as if it were transferred by feoffment with livery of seizin, notwithstanding there may be adverse possession thereof."

But the purpose of that statute was not to abolish the test by which to determine whether or not a given instrument be a deed or a will. Its main purpose was to dispense with the necessity of livery of seizin, in passing a freehold estate in land to vest or commence in the future, and to provide the means for transferring any interest in land *intervivos*.

The same Code elsewhere, also provides a means of disposing of one's lands and other property by last will and testament. A deed takes effect upon its delivery; but a last will and testament takes effect upon the death of the testator. The one is irrevocable; the other ambulatory and revocable. So, it is allowable, in this state, for a party to dispose of his lands by either of these modes. Whether or not a disposition of lands or other property was by deed or by will is a matter left for judicial construction; and its nature is determined by applying the test whether or not any interest whatever vests at the time of its execution, to be then enjoyed, or to be enjoyed in the future; if so, it is a deed, otherwise it is testamentary in its nature.

The substance of the statute quoted has been in every Code, as far back as the Code of 1857, including that Code; and, notwithstanding the fact that, by that Code and all subsequent Codes, any interest in land could be conveyed to commence in the future, the above

mentioned test for determining whether an instrument be a deed or a will has been applied by the courts. *Cunningham v. Davis*, 62 Miss. 366; *Leaver v. Gauss*, 62 Iowa, 314.

After the passage of the Statute of Uses, any interest in lands could be conveyed by deed of Bargain and Sale, or, by covenant to stand Seized to Uses, to commence in the future, even at the death of the grantor or convenator. *Bell v. Scammon*, 41 Am. Dec. 706; *Chancellor, et al., v. Windham, et al.*, 42 Am. Dec. 411; *Wall v. Wall*, 30 Miss. 91; *Exum, et al. v. Canty, et al.*, 34 Miss. 533; *McDaniel v. Johns*, 45 Miss. 632.

Notwithstanding that fact, the courts uniformly have announced and applied the test hereinbefore mentioned for determining whether a given instrument should be construed as a deed or testamentary in its nature.

The authorities cited show that the nature of the instrument is to be determined, from its provisions, and that it matters not what the maker calls it or what its form may be, or whether or not it be acknowledged and recorded as a deed; it will have that effect which the law gives to it. How then, are the courts to determine what effect the law gives to the instrument, unless it be by applying the test hereinbefore mentioned.

Moody & Williams, for appellees.

Before discussing the objections urged against the validity of the contract in question made by the attorneys for the appellants, in a very able brief by them, it may not be unprofitable to discuss, as briefly as possible, the nature of this contract from the appellees' standpoint.

By reference to the contract itself, it will be noted that the agreement of each of the parties thereto with the others is set out in different paragraphs. The terms of all of which are substantially the same. In

the first of these paragraphs it is stated: "That in the event the said Augustus B. Byrd and William G. Byrd should survive the said James W. Byrd, then the entire right, title and interest of the said James W. Byrd in all lands, and other property, now owned by the said James W. Byrd shall become the property of the said Augustus B. Byrd and William G. Byrd, who shall hold the same by fee simple title, subject only to the personal debts of the said James W. Byrd."

There are similar paragraphs by which Augustus B. Byrd and William G. Byrd, each, bound their property. The agreement by each of the parties furnished the consideration for a like agreement of the others. That there might not be any doubt as to its being the intention of the parties that the property owned by each should be thus bound, the contract further provides: "It being our intention, by this contract and agreement, that all of the property now held or owned, either jointly or severally, by the several parties to this contract, shall become the property of the surviving party or parties, whenever any or either of the parties thereto shall die," etc.

The contract itself makes it clear that each of the parties thereto intended that the others should be vested with this present interest in the property then owned by him and that this intention might be carried out the contract was executed by all, and duly recorded.

A will could not carry out the wishes of the parties. A will would not vest such a present interest in the property, as a will could only take effect at death, and until death, would, legally, be nothing more than so much waste paper. These parties wanted their property to be thus bound from the date the contract was executed. So it contains no provision whatever for a revocation of the contract. The present interest in the property of the others thus vested in each, by

the express terms of the contract, was not the fee simple title thereto, as the fee was not to be possessed, enjoyed, or even vest, until death, but the present interest that did vest, upon the execution of the contract, and by its express terms, was the right or assurance, not subject to revocation, that the fee would vest and be enjoyed by the survivors on the death of any of the parties thereto. This present right, that is to say, the absolute right to own the property in fee at death, by the express terms of the contract, vested when it was executed and delivered.

The estate or interest, that thus vested when the contract was executed, is designated at common law as an estate "upon conditions precedent." This was the estate, or interest, in the property that vested upon the execution of the contract, and such an estate is defined as follows:

"Estates upon conditions are of two sorts: those upon condition implied, and those upon condition expressed. An estate upon condition implied, is by law, and an estate upon condition expressed is one in which the condition is expressed in the instrument creating it."

"Estates upon conditions expressed are those upon conditions precedent, and those upon conditions subsequent. An estate upon condition precedent is such as when the condition must happen, or be performed before the estate can vest or be enlarged; thus, if an estate for life be limited to A upon his marriage with B, the estate is an estate upon condition precedent, and until that happens no estate is vested in A." 2 Blackstone, Commentaries, page 150, *et seq*; 4 Kent, Commentaries, page 133-137; 16 Cyc., page 606, and cases cited.

Thus, by the express terms of the contract, the estate in the property of the others that immediately vested in each by the express terms of the contract, was an estate upon condition precedent.

The condition upon which the fee simple title was to vest in the survivors was expressly designated, in the instrument to be the death of the signatory party whose property is claimed. The condition thus expressed had to happen before the fee simple title could vest. But the estate that immediately vested, upon the execution of the contract, was not the fee simple estate but the estate upon conditions precedent. Upon the happening of the event named, the fee vested, and did not vest until that event did happen. But, as stated the estate which did vest upon the execution of the contract was an estate upon conditions precedent. That is to say, the absolute right to be possessed of the fee at death.

Had the contract conveyed the right to the immediate possession of the property to a designated person, with remainder in fee to the survivors; or if the instrument, had been so worded as to express a covenant to stand seized for life with the remainder in fee to the survivors, which it impliedly does, it would be much easier to comprehend the nature of the estate that immediately vested in the survivors, upon the execution of the contract, and in that instance there could not even be any room for argument as to whether a present interest was, by the terms of the contract, vested in the survivors. In that case there would be a particular precedent estate upon which the remainder could rest.

We are not now concerned with the validity of the conveyance of an estate upon conditions precedent, without a precedent particular estate to support it, but only in determining the character of the estate that vested upon the execution of the contract. Yet the question arises, can an estate, upon condition precedent, without a precedent particular estate to support it, be created under the laws of this state? In other words, can an interest in, or claim to, land be con-

vayed, to vest in the future, without a particular precedent estate to support?

At common law, such an estate cannot be thus conveyed. At common law an interest in or claim to, land to vest in the future, must have a particular precedent estate to support it or have included in it a covenant on the part of the grantor to stand seized for life with the remainder in fee to the grantee. At common law, this is rendered necessary because no freehold estate can be conveyed without livery of seizin. We contend that the requirement of livery of seizin never obtained in this state, and if it did obtain, it has been abolished by statute.

In this state all lands are allodial, and the feudal tenure of real property never did obtain in this state. In this state lands are not, and never have been, holden of any lord or superior, but, on the contrary, have always been free. Livery of seizin was rendered necessary at common law, because of the feudal tenure of real property, but, as stated, it never did obtain in this state, and there is no reason why it should, where lands are allodial, not holden under a lord or superior.

In *Cassedy v. Jackson*, 45 Miss. 397-407, it is, among other things, said: "In this state the form of conveyance is very simple. It is usually by bargain and sale, which by operation of our statute, transfers the possession of the bargainor to the bargainee, without the necessity of livery of seizin or reference to the statute of uses.

The supreme court of Minnesota, in the discussion of this question, made use of the following language in *Sabledowsky v. Arbuckle*, 52 N. W. Rep. 920: "The reason why at common law a precedent estate was necessary to support a freehold estate, to commence *in futuro*, rested entirely upon the subtleties and technicalities of the feudal tenure of real property, which have no application in this state where all lands are allodial, and not held of any superior. Consequently,

we are strongly inclined to the opinion that even in the absence of any statute on the subject, it ought to be held that the common law rule is not applicable, but that a conveyance of a freehold estate in land to commence at a future time is valid, although no precedent particular estate is created by the conveyance. There is no good reason, in the nature of things, why this ought not to be so, but our statutes recognize, and impliedly authorize such conveyances."

What is true in Minnesota is true in this state and there is no earthly reason why a technicality, based solely on the feudal tenure of real property, which has never obtained in this state, should be used to defeat the deliberate intent and act of the parties. If however, this question had not been decided favorably to the contention made by us, both by the courts of this country in general, and of this state in particular, the question, at least insofar as this state is concerned, is put at rest by statute.

By section 2762 of the Mississippi Code of 1906, it is provided that: "Any interest in, or claim to, land may be conveyed, to vest immediately, or in the future, by writing, signed and delivered; and such writing shall have effect to transfer, according to its terms, the title of the person signing and delivering it, with all of its instruments, as fully and perfectly as if it were transferred by feoffment with livery of seizin, notwithstanding there may be an adverse possession thereof."

In which latter event, for the want of possession, there could not, of course, be livery of seizin. *Rogers v. Rogers*, 43 So. 434; *Robertson v. Robertson*, 94 Miss. 645.

We ask you to read this case, and especially the contract, which is identical with the contract in the case at bar.

While it is true the court further said that if the instrument should be construed to be a mutual, or even

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Opinion of the court.

a joint will, it cannot be revoked, and the suit must fail for that reason, yet it cannot, by any means, be said that the opinion of the court, in construing the instrument to be a valid contract is *obiter dictum*. See also, *Alexander v. Richardson*, 64 So. 217.

In view of what has been said, and especially in view of our statute and the decisions of this court, may we not confidently assume, not only that the contract in question is not a will, but also that it validly conveys all interest in, or claim to, land the fee simple title to vest in the future, namely, on the death of Augustus B. Byrd.

SMITH, C. J., delivered the opinion of the court.

While the solution of the question presented by this record is not without difficulty, we are of the opinion that the instrument here involved (which the reporter will set out in full) did not convey to any of the parties thereto any interest in the property of the others, to vest either immediately or in the future, but that the object sought to be accomplished by it was to cause whatever property each of the parties thereto might own at his death to vest, when that event should occur, in the surviving party or parties. The instrument, therefore, is testamentary in character, and can have no operation as a deed.

Reversed and remanded.

HAILEY v. McLAURIN'S ESTATE.

[73 South. 727, Division A.]

1. WILLS. *Construction*. "*Demonstrative legacy*." "*Specific legacy*." A bequest to a trustee to create, from the proceeds of the testator personal property and the sale of his real estate not situated in this state, a fund of two thousand five hundred dollars to be
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paid to a state charitable hospital, was not under the will in this case intended by the testator to be a "specific legacy" but a "demonstrative legacy," to be paid out of the general assets of the estate of the testator, if necessary, and was not adeemed because of the partial failure of the particular fund from which it was to come.

2. SAME.

The intent of the testator must control and determine the character of a legacy.

3. WILLS. *Bequest. "Religious or ecclesiastical corporation or association."*

Under chapter 115, Laws 1910, the board of trustees of the Mississippi State Charity Hospital are authorized to receive bequests of property when not contrary to the state Constitution, and such a bequest of personal property is not violative of our statutes of mortmain sections 5090 and 5091, Code 1906 which are the same as sections 269 and 270 of our state Constitution.

4. WILLS. *Validity. What law governs.*

The validity of a will of a citizen of Mississippi who devises lands to charitable institutions is governed as to lands in Tennessee, by the laws of that state which do not prohibit such devises of land or money raised by the sale thereof, to charitable institutions as are condemned by section 269 of our Constitution.

Appeal from the Chancery court of Hinds county.

HON. G. G. LYELL, Special Chancellor.

Suit between Mrs. Mary E. Hailey and the estate of J. W. McLaurin deceased. From a judgment, Mrs. Hailey appeals.

The facts are fully stated in the opinion of the court.

W. E. Morse, for appellant.

The will is clear and explicit and shows great care and diligence in the preparation thereof, and the testator set out in terms which can have but one construction, that he intended creating a special bequest and that it was his desire to evade the statute of Mortmain.

In the case of *Maloney v. Mooring*, 40 Miss. 247, our court said, "when a particular fund is referred to only as pointing out a convenient mode of payment, the

legacy is considered as demonstrative; but if the gift be of the fund itself, in whole or in part, or is so charged upon it as to show the intention to burden that object alone with the payment, it is esteemed specific. 2 Williams, Exrs., 1043 note 1; *Chatsworth v. Beech*, 4 Jeasy Jr. P. 555, note a; *Smith v. Fitzgerald*, 3 Ves. and B. 5; *Ludlam Estate*, 13 Penn. St. R. 188; *Bal-liet's Appeal*, 14 Jd. 461; *Walls v. Steward*, 16 Id. 275."

The following definitions of specific bequests show that the bequest in question falls under this head. *Palmer v. Palmer's Estate*, 75 A. 130, 106 Me. 26: "A specific bequest is a bequest of a specific thing or fund that can be separated out of all the rest of the testator's estate of the same kind so as to individualize it, and enable it to be delivered to the legatee as a particular thing or fund bequeathed."

The court said in the case of *Gardner et al. v. Vial et al.*, 90 A. 760 (R. I. Case): "A specific legacy is the bequest of a definite specific thing, capable of being designated and identified. A general legacy is one which does not necessitate the delivery of any particular thing or the payment out of any particular portion of the estate.

The Iowa court in 1914 said in the case of *Carpenter's Estate v. Wiley*, 147 N. W. 175: "If it is the intention to have it paid without reference to the fund upon which it is primarily a charge, it is general, but if it is specific, this definition has oftentimes been repeated and should be accepted as correct." See *Smith v. McKittereck*, 51 Iowa, 551, 2 N. W. 257, 8 N. E. 251.

"The bequest of a particular thing or money, specified and distinguished from all others of the same kind is a regular specified legacy. *Broadwell v. Broadwell*, 61 Ky. 290.

"A legacy is specific when it is the intention of the testator that the legatee shall have the very thing

bequeathed, and not merely a corresponding amount in value." *Wallace v. Wallace*, 23 N. H. 149.

"When a legacy by its terms, indicate a particular part of the testator's estate, it is specific, otherwise general." *Tift v. Porter*, 8 N. Y. 515.

"A specific legacy is a gift or bequest of some definite, specified thing, capable of being designated and identified. *In re Martin*, 54 A. 589, 25 R. I. Case.

"A specified legacy is the bequest of a particular thing or money specified and distinguished from all others of the same kind, which should at once vest with the assets of the executor; it is a part of the testator's property itself, it is sacred and distinguished from the whole of his property, and is liable to ademption." *Norris v. Garland Admr.*, 78 Va. 215.

In *Evans v. Hunter*, 86 Iowa, 413, 17 L. R. A. 308, 41 Am. St. Rep. 503, 53 N. W. 277, the court said: "A specific bequest is one which necessitates delivering a particular thing, or the payment of money out of a particular portion of the estate."

Numerous examples of what constitutes a specific bequest could be cited to the court, but a specific bequest is determined from the wording of the particular will and the intention of the testator controls, this is to be gathered from the interpretation of the entire will. The testator in this case could not have more clearly expressed himself, than when he directed from what portion of his estate the fund of twenty-five thousand dollars was to be created from. "And the said trustees or its successors in trust shall, out of the proceeds of my personal property, and out of the proceeds of the sale of my realty, not situated in the state of Mississippi, create a fund of twenty-five thousand dollars. The testator had already sold the land in question, but had not yet realized upon it; it was a part of his estate and could not have been better identified than it was in this instance. The appellee may claim that it is a broad division, but

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Brief for appellant.

there is no room to doubt that the testator meant what he said, and there can be no two constructions placed upon his meaning. It was his intention to create this fund absolutely and he provided minutely how the money was to be invested and reinvested. He was specific in his direction of the creation and maintenance of a trust fund, he was equally specific in directing how this fund was to be created from what portion of his estate it was to be taken, showing that this was a specific bequest, and this fund was to be taken from a specific portion of his estate. There can be no doubt that the testator did not want money from the sale of his land located in the state of Mississippi to be included in this amount; we can infer that it was the intention of the testator to evade the Statute of Mortmain; had this been his intention he could not have been more specific as to where the money was to be created from.

But there was a failure of this specific bequest; when the executor's report was made it was explained to the court that there was not enough assets to pay the specific bequest, and permission was asked to loan the fund so as to increase the same until it would equal the amount of twenty-five thousand dollars.

The court held in the case of *Morris v. Garland, Admr.*, 78 Va. 215, "A 'Specific Legacy' is a gift of a particular specific thing, or the proceeds of the sale of a specific thing, or a specific fund, or a definite portion thereof, and it is satisfied by the delivery of the specific property identified as the subject-matter of the gift, and where the same is not owned by the testator at the time of his death, the legatee takes nothing, for he has no claim on the general assets."

The executor and the court placed this construction upon this will, they did not attempt to have the lands situated in the state of Mississippi sold to satisfy this legacy, but recited in one of their petitions that it would be unlawful to use the proceeds from the sale of the realty in the state of Mississippi. The

executor attempted to carry out the will of the testator and asked leave of the court to lend money to create this bequest. Now it is a principle that the courts lean against the construction of a bequest as being specific, but at the same time they lean against the construction or interpretation of a will in favor of a charity as opposed to the natural heirs of the testator, one of these leanings should lean against the other and contract its influence. The court, when the request was made for permission to loan this money, granted the request, thus showing that the court below did not consider the same as either a general or a demonstrative bequest.

40 Cyc. on the subject of Willis, page 1869, says, "A specific legacy is the bequest of some definite, specific thing capable of being designated and identified; one which separates and distinguishes the property bequeathed from the property of the testator so that it can be identified, and delivered to the legatee as a particular thing or fund bequeathed. Such a legacy can be satisfied only by a delivery to the legatee of the particular thing bequeathed to him, and if the thing is not in existence when the bequest would otherwise become operative, the legacy has no effect."

Thompson in an exhaustive book of Wills published in 1916 on page 122, had this to say in regard to specific bequests: "A specific legacy is the gift of something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state or condition indicated by that description, separates in favor of a particular legatee from the general mass of his personal estate. *Bairner v. Cowdry*, 16 Conn. 1; *Bradford v. Haynes*, 20 Me. 105; *Towle v. Swansey*, 106 Mass. 100; *Crawford v. McCarty*, 159 N. Y. 514.

I take it that it is a rule of law that is too obvious to require the citation of authorities that a specific bequest vests in the beneficiary immediately upon the

death of the testator and it is equally as obvious that if the thing bequeathed is not in being at the death of the testator, the beneficiary takes nothing.

The special bequest which the testator in this case made to the state charity hospital, failed when the proceeds from the personal property and the proceeds from the sale of the real property, not located in the state of Mississippi failed to measure up to the amount bequeathed. The court should have declared that the bequest had failed and that the moneys that were in the possession of the trustee should have been turned over to the residue beneficiaries under the will.

Whitfield & Whitfield, for appellees.

The tendency of the courts is very strong against ever construing a legacy to be specific if it can be reasonably made out to be general or demonstrative. In Jarman on Wills, volume, 2, bottom of page 1067, the author says: "But in construing wills the court leans very strongly against specific legacies, so that in case of doubt the more probable view is that the legacy is not specified."

Mr. Jarman, in Volume 2, page 1065, points out the fact that in the earlier cases definitions of specific legacies have been given, which, in the light of some recent authorities, are found to be incompleated or inaccurate. And in 1 Underhill on Wills, section 405, it is again repeated that the leaning of the courts is to construe legacies as general and not as specific.

The best statement and definition of a demonstrative legacy, one which has been agreed upon by all the courts, is that given by Lord Thurlow, Underhill on Wills, Volume 1, section 406, where he says: "A demonstrative legacy is one which is in its nature a general legacy, but where a particular fund is pointed out to satisfy it."

We submit that this is a perfectly sound, ample and full definition of a demonstrative legacy. In this case, the testator points it out, the proceeds of the lands not in the state of Mississippi the proceeds of his personal property, both as the fund out of which primarily this twenty-five thousand dollars was to be paid. It was clearly a demonstrative legacy. It was, in case there should be a deficiency of assets to pay the twenty-five thousand dollars, not to be subject to ademption. The whole twenty-five thousand dollars was not to fail or to be adeemed, simply because there was not quite twenty-five thousand dollars of assets; nor was the legacy to suffer any abatement for want of a sufficiency of assets, if the twenty-five thousand dollars could be made up out of the general assets. We subjoin some other authorities which we think make it clear. Jarman on Wills, at the bottom of page 1071.

This is decisive, it seems to us especially in view of the doctrine laid down in Underhill on Wills and elsewhere, "that the courts lean more strongly against specific legacies, and that a demonstrative legacy is not subject to ademption or to abatement. 1 Underhill on Wills, sections 406 and 407; Page on Wills, section 770; Section 774, Underhill; 40 Cyc., page 1869, et seq.; *Croom v. Whitfield, et al.*, 45 N. C. 143; *Morton v. Murrell*, 68 Ga. 147; 1 Underhill on Wills, section 406; 3 Pomeroy on Equity, section 1133.

It must be perfectly manifest, if we turn now to the definition of a specific legacy and apply that to the facts of this case, that this legacy of twenty-five thousand dollars to the trustees of the State Charity Hospital, to be paid out of the proceeds of his personal estate and the proceeds of his lands not in Mississippi is plainly not a specific but a demonstrative legacy. We shall not waste time on this branch of the case. Suffice it to say that in 1 Underhill on

Wills, section 407, many instances of a specific legacy are given, as they are given in Jarman and in Cyc.

Counsel's second proposition that this bequest violates the Constitution of the state with regard to the Statute of Mortmain is clearly unsound. The Mississippi State Charity Hospital, through its trustees, clearly had the right to receive this legacy and to apply it; clearly had the power to execute the trust.

Here is a legacy or personal property, not land, and this legacy is given in trust to the trustees of the State Charity Hospital to administer according to the directions of the trust. There is nothing in all of this that can be the subject of objection.

Watkins & Watkins, for appellees.

The question first presented and now under discussion is whether or not this devise for the purpose expressed, violated sections 269 and 270 of our organic law. A mere analysis of the two sections of our Constitution as heretofore construed by this court will demonstrate that the devise was carefully made by the testator so as to avoid any constitutional objections thereto. The two sections, while read together, deal with separate classes of property. Section 269 deals with lands; section 270 deals with personal property. By section 269, devises of lands, or interests growing out of lands, in favor of a religious or eleemosynary corporation or society, or to any religious denomination, or to any person or body politic, in trust, for the use of any religious corporation, society, denomination or association, or for the purpose of being appropriated to charity are prohibited.

Section 270, however, is much more limited in its scope, and only prohibits devises of personal property when made in favor of a religious or eleemosynary corporation or society or religious denomination for its own use and benefit, or for the purpose of being

or appropriated to charitable purposes by such religious, eleemosynary corporation, society, denomination or association. In other words, the prohibition is against the devise of personal property to a religious corporation, in society, denomination or association, and there is no prohibition against the devise of personal property for charitable purposes to any other kind of organizations. In other words, section 270 deals with personal property and does not contain the comprehensive language used in section 269 of the Constitution against devises to any person or body politic, in trust, etc. The identical question was passed on by this court in the case of *Blackman v. Tucker*, 72 Miss. 735. In that case a decedent devised to an educational institution for its purposes, that is to say, for educational purposes, his real and personal property. This court held very properly that under section 269 of the Constitution, the devise was void as to realty but good as to personalty. The Senatobia Educational Association being neither a religious denomination, corporation or association, there being no prohibition in section 270 against an educational corporation taking such property either for its own purposes or for charitable purposes. Section 270 prevents and prohibits a religious or denominational or eleemosynary corporation, society or denomination, or association from taking personal property, either for its own use or for charitable purposes, but does not prohibit an educational corporation, denomination, society or association or any kind of corporation, denomination, association, or society from taking a devise of personal property, either for its own use or for charitable purposes.

Suppose, however, we should be in error in this connection. Suppose the court should hold that the Memphis property in which Dr. McLaurin was interested at the time of his death was still real estate and not personalty. Then in such event we respectfully submit

that the devise of this real estate, situated in Tennessee, would be determined by the laws of the state of Tennessee, and not by the laws of the state of Mississippi. And under the laws of the state of Mississippi the devise in question was perfectly valid. It was held recently that devises of real estate must be determined by the law of the place where the real estate is situated. 110 Cyc. pages 1074-1075.

So if the court should hold that the Memphis property was real estate and not personal, we respectfully submit that the devise is perfectly valid because under the laws of the state of Tennessee there exists no prohibition against such devises.

It will be noted that the testator in executing this will had present in his mind the identical question involved. He was in doubt as to whether the court would determine the Memphis property to be realty or personalty. He knew that devise of his Mississippi real estate for the purpose of this trust would be invalid. He knew, however, that as to his personal estate the devise would be valid under section 270 of the Constitution. Therefore, in order to remove any question as to the legality of his will, he simply provided that his trustee should create a fund of twenty-five thousand dollars from his personal estate, and from his real estate situated other than in the state of Mississippi.

HOLDEN, J., delivered the opinion of the court.

The deceased, Dr. J. W. McLaurin, bequeathed twenty-five thousand dollars to the Mississippi State Charity Hospital, using the following language in the will:

"To the Jackson Bank, a corporation authorized by its charter and laws of the state of Mississippi to execute trusts as trustee, I devise and bequeath at my death all of the property, real or personal or mixed

which I may own at the time of my death for the following purposes, to wit: . . .

"The said trustee or its successor in trust shall, out of the proceeds of my personal property, and out of the proceeds from the sale of my real estate, not situated in the state of Mississippi, create a fund of twenty-five thousand dollars, which fund of twenty-five thousand dollars the said Jackson Bank or its successor in trust shall pay over and deliver to the trustees of the Mississippi State Charity Hospital, Jackson, Mississippi, and the receipt of the said trustees to the said Jackson Bank shall be a full and complete acquittance to it of said sum. The said trustees of the Mississippi State Charity Hospital, Jackson, Mississippi, shall reinvest said funds and income therefrom until the principal thereof shall equal the sum of fifty thousand dollars, which fund of fifty thousand dollars shall be used by said trustees as follows, to wit. . . ."

The appellant contends: First, that the bequest to the hospital is a specific bequest, and failed because the proceeds from the personal property and the proceeds from the sale of the real estate in Tennessee amounted to only about twenty-two thousand five hundred dollars; second, that the bequest is invalid under sections 269 and 270 of our state Constitution.

It plainly appears from the language of the will that the bequest was not intended by the testator to be a specific legacy, but that it is a "demonstrative legacy," to be paid out of the general assets of the estate of the decedent, if necessary, and is not adeemed because of the partial failure of the particular fund from which it is to come. The intent of the testator must control and determine the character of the legacy; and we find no difficulty in coming to the above conclusion from a careful consideration of the whole will. Underhill on Wills, vol. 1, sections 406, 407; Page on Wills, section 770; 40 Cyc. 1869, 1870-1874; *Croom v. Whitfield*, 45 N. C. 143; Jarman on Wills, vol. 2, p. 1063; Pomeroy

on Equity Jurisprudence, vol. 3, section 1133; *Malone v. Mooring*, 40 Miss. 247; *Fisk v. McNeil*, 1 How. 535; *Minor v. Stewart*, 2 How. 912; *Vaiden v. Hawkins*, 59 Miss. 406; *Chrisman v. Bryant*, 108 Miss. 311, 66 So. 779.

Under chapter 115, Laws of 1910, the board of trustees of the Mississippi State Charity Hospital are authorized to receive bequests of property when not contrary to the state Constitution.

The bequest here was of personal property to the board of trustees of a state charitable institution and was not a bequest to a religious or ecclesiastical corporation or association, as prohibited by section 270 of our Constitution, as it appears that the real estate in Tennessee had been converted into personal property before the death of the testator; but, regardless of this fact, the laws of Tennessee, where the land is situated, which govern here, do not prohibit such devises of land, or money raised by the sale thereof, to charitable institutions as are condemned by our Constitution (Section 269). We here set out the material parts of the two sections referred to:

"Sec. 269. Every devise or bequest of lands, tenements, or hereditaments, . . . or of any money directed to be raised by the sale thereof, contained in any last will and testament, or codicil, or other testamentary writing, in favor of any religious or ecclesiastical corporation, . . . or to any person or body politic, in trust, either express or implied, secret or resulting, either for the use and benefit of such religious corporation, society, denomination, or association, or for the purpose of being given or appropriated to charitable uses or purposes, shall be null and void, and the heir at law shall take the same property so devised or bequeathed, as though no testamentary disposition had been made.

"Sec. 270. Every legacy, gift or bequest of money or personal property, or of any interest, benefit, or use

therein, either direct, implied, or otherwise, contained in any last will and testament or codicil, in favor of any religious or ecclesiastical corporation, sole or aggregate, or any religious or ecclesiastical society, or to any religious denomination or association, either for its own use or benefit, or for the purpose of being given or appropriated to charitable uses, shall be null and void, and the distributees shall take the same as though no such testamentary disposition had been made."

Therefore we do not hesitate to hold that our Statutes of Mortmain, section 5090 and 5091, Code of 1906, which are the same as sections 269 and 270 of our Constitution, are not in the way of the validity of the beneficent bequest here made by the deceased, Dr. J. W. McLaurin, to the Mississippi State Charity Hospital, to be used there for the benefit of suffering humanity.

The bequest in question is valid in all respects, and the decree of the chancellor in the lower court is correct and proper in every regard, and is affirmed.

Affirmed.

BRYAN v. CITY OF GREENWOOD.

[73 South. 728, Division A.]

1. STATUTES. *Sufficiency of title.*

There is no constitutional requirement as to the sufficiency of the title of a legislative act.

2. STATUTES. *Amendment. Constitutional provisions.* "To be amended as follows."

Laws 1912, chapter 260, providing that the statutes therein dealt with should "be amended as follows" does not violate section 61 of the Constitution, for the Legislature, by providing that the

statutes therein dealt with should "be amended as follows" manifestly intended that they should "be amended so as to read as follows."

3. MUNICIPAL CORPORATIONS. *Street improvement. Ordinances. Description.*

Where a city ordinance providing for paving was incomplete for the reason that it provided "that said paving be done with any one of the following materials to wit: Bithulithic, creosoted wooden blocks, or vitrified brick." This defect if such it was, was remedied by a subsequently adopted ordinance, providing that the paving be done with creosoted wooden blocks.

4. SAME.

In such case if the first ordinance was incomplete a property owner had the statutory period after the publication of the second ordinance, in which to file a protest against the proposed improvement.

5. PLEADING. *Admission. Matter to be proved. Publication. Evidence.*

Where a bill of complaint alleged the publication of an ordinance and this was not denied by the answer, no evidence of such publication was necessary.

6. MUNICIPAL CORPORATIONS. *Street improvement. Notice.*

Since Laws 1912, chapter 260, in relation to public "improvements," does not require notice to property owners other than that contained in the publication of an ordinance passed under the statute, which allows a property owner 30 days in which to do the work of a proposed improvement abutting his property, and Code 1906, section 3412, providing for such notice, was not brought forward in the statute, a property owner could not complain that no notice was given him by the city to lay the pavement himself.

7. MUNICIPAL CORPORATIONS. *Street improvements. Right of property owner to make.*

Since no duty is imposed on the Legislature by the Constitution to permit property owners to make special improvements themselves and such a provision could have been omitted altogether from the statute, the question whether the 30 days allowed property owners under the statute to do the work themselves, is a sufficient length of time to enable them to do so, is wholly immaterial.

8. MUNICIPAL CORPORATIONS. *Street improvement. Ordinance.*

Where an ordinance providing for street improvement was duly published, a property owner cannot resist payment of his assess-

ment on the ground that he failed to protest against the improvement; because he thought the city intended to pay the entire cost thereof itself and charge no part thereof to the property owners, for the reason that it adopted an ordinance providing for the issuance of bonds for the purpose of obtaining money with which to pay for improvements on several of its streets on one of which defendant's property was located.

APPEAL from the chancery court of Leflore county.
HON. Joe May, Chancellor.

Suit by the City of Greenwood against E. F. Bryan.
From a decree for plaintiff, defendant appeals.

On June 4, 1912, the board of mayor and aldermen of the city of Greenwood passed an ordinance providing for the paving of certain streets and prescribing that the paving should be either bitulithic, creosoted wooden blocks, or vitrified brick, and that the work should be done in accordance with the plans and specifications on file. The ordinance was duly published, and, no protest against the paving having been filed, the board, on August 9th, accepted the bid of a contractor providing that the paving be done with wooden blocks; the city to pay one-third of the total cost and the property owners on each side to pay one-third. The appellant, an abutting property owner, having failed to pave his portion of the street within the thirty days allowed by law, the city proceeded to pave the street in front of his property, and upon his refusal to pay his portion of the cost filed a bill in chancery to enforce a lien against his property for the cost of the improvements. The appellant in his answer attacked the constitutionality of the law (chapter 260, Laws 1912) under which the ordinance was passed. There was a decree granting the relief prayed, from which comes this appeal.

The title to the act referred to reads as follows:

"An act to amend chapter 203 of the Laws of 1910, entitled 'An act amending section 3413 of the Code of 1906, providing that protests against sidewalk con-

struction shall be made by the residents of the municipality owning property in front of which the sidewalk to be repaired or constructed is located; and providing for notice of the repair or construction of the sidewalk to be given by publication and posting;' to amend section 3411 of the Code of 1906 in relation to special improvements by municipalities; to amend section 3412 in relation to special assessments to pay for the special improvements; and to amend section 3413 in relation to special improvements for sidewalks."

Monroe McClurg, for appellant.

Counsel cite three cases in defense of the assault upon the title. In *Mayor v. State*, 102 Miss. 663, Judge Cook, speaking for this court, held that the act "shall" have a title and the legislature could not ignore that constitutional command, but that the legislature was the sole judge as to what the title "ought" to contain. In *University v. Waugh*, 105 Miss. 623, Judge ROBERT MAYES said: "We need only cite the case of *Mayor, etc., v. State*, holding the sufficiency of the title is a legislative and not a judicial question." And in *State v. Phillips*, 67 So. 651, Judge Cook said: "All questions of this kind are foreclosed by the decision in *Mayor v. State*." So, it is settled that "shall have a title" is a judicial question, but what the title "ought" to contain is not. And that is all that there is in those three decisions. In *Sea v. Laurel Plumbing Metal Co.*, 71 So. 9, the act had a title, but it did not point out what the purposed amendment was, and the act was declared void. In *Levee Com'srs. v. Ins. Co.*, 96 Miss. 382, the act had a title, but that title omitted to mention one section, set out in full as amended, and that section was declared void. Hence, the contention in the instant case that when the title is examined in view of the body of the act, it is condemned by the two cases last above mentioned. The

legal deduction is there is no title unless there is something definite in it.

Counsel rely upon the Edwards House case for their precedent in the form of the draft of the ordinances against which no complaint is here made. In fact the original brief admits the binding force of that opinion so far as it applied to the facts in this one. They rely upon it as answering our contention that no proof of the publication was made because publication was not denied in the answer. The overruled demurrers set up as one ground, and repeated as a special plea, that there was no equity on the face of the bill. In *University v. Waugh, supra*, this court said and held: "This bill was demurred to on many grounds, but we see no occasion to go beyond the first. The first grounds of demurrer challenges the fact that there is any equity on the face of the bill. We think this challenge brings into view, at once, the whole of this case." Hence, even though the bill alleged the publication, the city could not stop, in the face of the defenses set up, short of proving its full case justifying the claim to a decree to sell the property to pay for the complete special work. Nor was the defendant called upon in a court of equity to object or except to any proof not legally offered and which was necessary to complainant's success. Nor was this point, or the point that appellant has insisted upon throughout this case, that the time fixed by the statute was unreasonably short, raised or decided in the Edward's House case, so it is the argument of counsel is not sound in urging the self asserted opinion of complainant that the publications had been made and everything else done as required by law, such statement of an indispensable fact by the complainant required proof.

It may be true that under the 1912 Act no notice except by publication was required to be given the property owner, but it was required under the previous

statute which the counsel could not tell, as argued in the original brief, had not been repealed by that act.

The Edward's house case was decided before the passage of the 1912 Act, hence it can have no bearing upon the claim to the utter unreasonableness of that act generally, nor does it decide that the thirty days was reasonable time because in that opinion Judge MAYES expressly forestalls any decision of that precise question. Hence, as we have argued, it is yet an open question now squarely presented the first time. So, it cannot be, that in that case it was intended to be decided that thirty days was sufficient time, or the law constitutional, for the further reason that the point was not decided in the cases cited therein.

The third paragraph on page 8 of counsel's brief discloses the vice in the only plausible defense, though a helpless one, that can be made in this case, namely: that "the legislature had a perfect constitutional right to authorize the municipality to pave the streets without even giving the property owners an opportunity to do the work themselves." Giving the opportunity is a "matter of Grace" say counsel, and not obligatory upon the legislature. That argument is admitted; but is not the case here. The legislature did give the property owner the right in positively unquestionable language, but practically denied the opportunity to do it by unreasonably limiting the time. So, the legislature did not attempt to exercise its known power to absolutely deny the right to the property owner; it would have been contrary to the long, well established public policy of the state to have done so.

Counsel's citations of authority to sustain their position on this point fail them; they seem to be inapplicable to the decisive question. Section 819, Dillon on Corporations, merely holds that in a suit by a vendor against the corporation for paving materials it is no defense to say the council had not passed the paving ordinance before the purchase of the materials, but

would be different if lot owners were required to do the paving, in which case the city would be held to strict compliance with its charter. Sections 1145 and 1146 of that treatise distinguishes between special assessments, and taxes, in that the constitutional requirement that taxation shall be "equal and uniform does not apply to local assessments upon private property (1145); but the great weight of authority precludes the imposition of a special assessment for street or other local improvement upon such property, unless there is positive legislative authority therefor." And, we still persist that such statute must not only be positive and clear, but also reasonable in the view contended for in our original brief. The other sections referred to are as equally inapplicable, in our view, to the contention.

Lomax & Tyson for appellee.

Answering the contentions of appellant set out in the first four pages of this brief, to the effect that the title of chapter 260, Laws 1912, is insufficient, we quote herewith authorities which are conclusive on this contention. *Mayor v. State*, 102 Miss. 663; *University v. Waugh*, 105 Miss. 623; *State v. Phillips*, 67 So. 651.

With these citations we leave the grave of the "Titled Hero" to counsel for appellant confident that the "farewell shot" will not arouse him from his eternal slumber.

In passing the initial resolution, or ordinance of June 4, 1912, announcing the necessity of the paving, as well as announcing three materials from which it might be made and that the property owners would be required to pay two-thirds of the cost thereof, and in passing the resolution or ordinance, of August 9, 1912, the city council of Greenwood pursued the identical method, by the identical means, as those pursued in the *Edwards House* case (*Edwards House v. City of Jackson*), except that the first ordinance in the *Edwards*

House case made no mention of the kind of material to be used or of what proportion of the cost of the improvement the property owners would be required to pay. So far as the passing and publication of the first two ordinances are concerned, the requirements of section 5, chapter 260, Laws 1912, under which resolutions, or ordinances, in the case at bar, were passed and published were the same as were the requirements of sections 3011 of the Code of 1892, the statute under which the two ordinances in the Edwards House case were passed and published. It follows that, as to these two resolutions, or ordinances, and their publication, the Edwards House case is absolutely controlling and as for that matter—this entire case is covered as by a blanket by the Edwards House case so completely as to make citations of other authorities to sustain any contention we make herein entirely burdensome and superfluous. The initial resolution, or ordinance of June 4, 1912, followed exactly in the footprints of the initial resolution, or ordinance of January 7, 1902, in the Edwards House case would be construed as naming the proportionate part of the improvements the property owners would be required to pay.

And the second resolution, or ordinance, of August 9, 1912, followed exactly in the footprints of the second resolution, or ordinance, of February 4, 1902, in the Edwards House case. Inasmuch, then, as the two resolutions, or ordinances announcing the necessity for the paving, specifying the character of paving and stating the proportionate part of the cost of same to be borne by the property owners, were identical as stated, and followed, in every detail, and even in language, the two resolutions or ordinances passed on in the Edwards House case, and inasmuch as the requirements for the proper passing of said resolutions or ordinances were identical in the two cases, we submit that the contention made by appellant, on pages 5 to 9 inclusive of his brief, to the effect that said resolutions or ordinances did "not

Brief for appellee.

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sufficiently describe the material," cannot be maintained, since the Edwards House case decided against this same contention on practically the same facts. *Edwards v. City of Jackson*, 91 Miss. 429.

But counsel says the resolution or ordinance of August 9th was not published. The bill, in the case at bar, as in the Edwards House case, alleged that this resolution or ordinance was published as provided by law, and according to the provisions of chapter 260, Laws 1912; consequently counsel, in making the statement that it was not published, must have overlooked the fact that the answer failed to deny that it was published, thus leaving this allegation of the bill as confessed and unnecessary to be proven under section 584, Code 1906, as well as under the general principles of equity pleading.

There is some conflict in the evidence as to when notice was given appellant by the street commissioner, but this is entirely immaterial as it was unnecessary, under said chapter 260, Laws 1912, to give any notice at all, other than such as was afforded by the publication of the resolutions or ordinances; and it was simply in the exercise of a superabundance of undue and unnecessary caution on the part of the city authorities that the street commissioner was directed to give any notice whatever in the case at bar. The giving of this notice was not necessary as it was in the Edwards House case for section 3012, Code 1892, the statute law regulating the matter at that time specified that notice should be given by the street commissioner, while this requirement is not made in chapter 260, Laws 1912, the statute under which the proceedings in the case at bar were taken.

Neither was it necessary to publish the plans and specifications. Just as was required in Edwards House case the two ordinances of June 4th and August 9th stated that the plans and specifications were on file and had been adopted in the clerk's office at the city hall.

The complaint of the appellant here is that the thirty days allowed for him to put down the paving was entirely insufficient and this seems to be his sole complaint, yet under the facts of the case as shown by the undisputed evidence, no work was begun on any of the streets prior to the latter part of October or the first part of November, 1912. Consequently appellant actually had, not only thirty days "after the order of the board had been passed for the special improvements" but he had almost, if not quite, one hundred fifty days from the passage of the ordinance of June 4th and almost, if not quite, ninety days from the passage of the resolution or ordinance of August 9th. Yet not only did he fail to do, or to begin the work but he failed to make any effort to do so.

But it seems that counsel raises no serious contention in this case save by way of attack on the constitutionality of chapter 260, Laws 1912, for with reference to his other two or three minor contentions, discussed above, he frankly says, on page 18 of his brief: "So far as the facts in this case follow the Edwards House case that case is conclusive of this one and they are almost on all fours in the direct assault here made on the statute."

We differ with counsel in his opinion that the court, in the Edwards House case, did not have squarely presented to it the question of the unconstitutionality of the statute considered in that case. The court did have presented to it with great elaboration in the briefs of opposing counsel, the direct point that section 3012, Code 1892, which allowed only twenty-five days, at the most, to the owner, to make the improvements (instead of thirty days as allowed in the case at bar) was unconstitutional under sections 14 and 17 of our state Constitution and the Fourteenth Amendment to the Federal Constitution. The court expressly held on page 473 it would seem "that section 17 of the state Constitution has no application to the question of special

assessments" or to section 3012, Code 1892, and says further on page 473, "It would seem from the authorities quoted that all the other constitutional questions raised by counsel for appellant here have been settled against their contention" and "these sections have repeatedly been before the court and each time they have been upheld as constitutional and we see no reason to change the court's ruling upon this subject." Citing various authorities to the same effect, such as *Nugent v. Jackson*, 72 Miss. 1040; *Greenville v. Harvie*, 79 Miss. 754; *Wilzinski v. Greenville*, 85 Miss. 393.

The reasons urged here as grounds why said section 13, chapter 260, Laws 1912, is unconstitutional are that its provisions are violative of—first, the Fourteenth Amendment and the Fifteenth Amendment of the Federal Constitution; second, the seventeenth section of our state Constitution; and third, the twenty-fourth section of our state Constitution.

With the exception of section 24 of the state Constitution these identical grounds, and still other grounds, were urged in the Edwards House case against the Constitutionality of section 3012, Code 1892, and expressly decided by the court to be insufficient. The whole argument against the constitutionality of said chapter 260 in the case at bar, is based entirely and alone upon the fact that thirty days was not a reasonable time to give the owner of the property to pave the street himself; and yet these identical constitutional provisions were held not to have been contravened, in the Edwards House case, by section 3012, Code 1892, a statute prescribing a shorter time by five days at least than the statute attacked here.

It seems that section of the state Constitution is invoked against section 4 of chapter 260 of the Laws, of 1912, the objection being that because said section, by providing that the mayor and board of aldermen shall be the sole judges of the necessity of the improvements, thus prevents any person from "having a remedy by

due course of law for an injury done him or his lands, etc." This contention is unsound since our court, as well as all other courts have held that the proper city authorities have the constitutional right to judge of the necessity of such improvements and to be the judges of the other matters set out in said section 4. 3 Dillon on Municipal Corporations, (5 Ed.), secs. 1151, 242-243, 1365; 28 Cyc. 955; *Wabash v. Defiance*, 42 L. Ed. (U. S.) 87; *Nugent v. Jackson*, 72 Miss. 1040-1056.

But aside from all the authorities cited above and the arguments adduced therefrom, appellant here has no right to complain that the thirty days' time allowed him for doing the work was inadequate. The legislature had a perfect constitutional right to authorize the municipality to pave the streets without even giving the property owners an opportunity to do the work themselves. All authorities hold that the legislatures of the various states have the right to delegate to the municipal authorities the right to improve streets and to assess the cost thereof, in whole or in part, against the abutting property owners. The granting of the right to the property owners to put the improvements down themselves is purely a matter of grace and a thing which it is not obligatory on the state legislature, under any constitutional limitation, to do. The legislature having this absolute power to assess cost of improvements against abutting property owners, it necessarily follows that any declaration of the legislature, through statutes enacted by it, giving abutting property owners the privilege of making the improvements themselves cannot be unconstitutional no matter how short the time allowed for doing so may be; and this, for the reason that it was not necessary for the legislature, under any constitutional limitation, to grant any time at all to the property owner or to allow him the privilege of doing the work at all. 4 Dillon, Munc. Corp. (5 Ed.), secs. 819, 1145, 1149, 1431, 1436, 1437, 1443; Elliott on Roads & Streets, (1890 Ed.) pp. 369 to 374.

We therefore submit that chapter 260, Laws 1912, is impervious to constitutional attack for the reason set out.

SMITH, C. J., delivered the opinion of the court.

Appellant's objection of the title of chapter 260, Laws of 1912, is ruled against him by *Mayor v. State*, 102 Miss. 663, 59 So. 873, Ann. Cas. 1915A, 1213; *University v. Waugh*, 105 Miss. 623, 62 So. 827, L. R. A. 1915D, 588; and *State v. Phillips*, 109 Miss. 22, 67 So. 651, L. R. A. 1915D, 530. And there is no merit in his contention that the statute violates section 61 of the Constitution, for the legislature, by providing that the statutes therein dealt with should "be amended as follows," manifestly intended that they should "be amended so as to read as follows."

Conceding for the sake of the argument that the first ordinance was incomplete for the reason that it provides "that said paving be done with any one of the following materials, to wit, bitulithic, creosoted wooden blocks or vitrified brick," this defect, if such it was, was remedied by the ordinance adopted on August 9th providing that the paving be done with creosoted wooden blocks. *Edwards House v. City of Jackson*, 91 Miss. 429, 45 So. 14. It is true that no evidence of the publication of this second ordinance was introduced, but such evidence was unnecessary for the reason that the bill of complaint alleged its publication and this was not denied by the answer. If the first ordinance was incomplete, appellant had the statutory period after the publication of the second in which to file a protest against the proposed improvement, and, as we understand the evidence, no protest was filed after the publication of either of the ordinances.

Appellant claims that he was deprived of his right to lay the pavement in front of his premises himself for the reason: First, that no notice was given him by the

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Opinion of the court.

city so to do; and, second, that the thirty days permitted him by the statute in which to do the work was insufficient for that purpose. The statute does not require such notice, other than that contained in the publication of the ordinance, to be given, the provision relative thereto contained in section 3412 of the Code of 1906 not being brought forward therein, and whether the thirty days allowed property owners in which to make special improvements is a sufficient length of time to enable them so to do is wholly immaterial for the reason that no duty is imposed upon the legislature by the Constitution to permit property owners to do such work themselves, so that such a provision could have been omitted altogether from the statute.

One of appellant's contentions, as we understand the brief of his counsel, is that the reason he failed to protest against the laying of this pavement was that he thought the city intended to pay the entire expense thereof itself and charge no part thereof to the property owners, for the reason that it adopted an ordinance providing for the issuance of bonds for the purpose of obtaining money with which to pay for improvements on several of its streets, among which was the one on which the property here in question is situated. He should not have been so misled, and therefore is entitled to no consideration on that account.

Affirmed.

SHOWS v. STATE.

[73 South. 729, Division B.]

CRIMINAL LAW. Continuance.

Where accused was indicted for having carnal knowledge of a previously chaste female younger than himself, and was released on his agreement to marry her, and he procured a marriage

license, and went to his home in an adjoining county, a considerable distance from where the court was being held, and all of his witnesses were released from their subpoena under the agreement of marriage, and he was arrested in less than 24 hours after his release, upon the report of the father of the girl that accused had not executed his agreement and that he (the father) believed accused was attempting to get a continuance of the case without executing his agreement and accused was put on trial immediately without a single witness and before he had an opportunity to obtain counsel. In such case it was reversible error to refuse accused request for sufficient time to prepare a formal application for a continuance of the trial to a later day of the term, since it did not appear that accused declined to execute the agreement or that he was acting in bad faith and the fact that the day of his trial was the last day in which the judge intended to devote to criminal business though not the last day of the term was immaterial.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Otho Shows was convicted of having carnal knowledge of a previously chaste female person and appeals. Section 1081 of the Code of 1906 provides that:

“Any person who shall seduce or have illicit connection with any female child under the age of eighteen years, of previous chaste character, shall, upon conviction, be imprisoned in the penitentiary not more than ten years; but the testimony of the female seduced alone shall not be sufficient for conviction.”

Chapter 171 of the Laws of 1914 provides:

“That any male person who shall have carnal knowledge of any unmarried female person of previous chaste character younger than himself, and over twelve and under eighteen years of age, upon conviction shall be punished either by a fine not exceeding five hundred dollars or by imprisonment in the county jail not longer than six months, or by both such fine and imprisonment or by imprisonment in the penitentiary not exceeding five years; and such punishment within said limitation, shall be fixed by the jury trying each case. In the trial of all cases under . . . this act, it shall

be presumed that the female was previously of chaste character, and the burden shall be upon the defendant to show that she was not; but no person shall be convicted upon the uncorroborated testimony of the injured female."

The material portion of the indictment against appellant is in the following language:

"That Otho Shows on the 28th day of March, 1914, in Forrest county aforesaid, then and there being an unmarried man, did then and there unlawfully, willfully, and feloniously seduce and have illicit, sexual intercourse with one Lola Styron, an unmarried female child under the age of eighteen years, and being of the age of fourteen years, and of previous chaste character, the said Otho Shows being a male person and older than the said Lola Styron, his exact age being to the grand jurors unknown, against the peace and dignity of the state of Mississippi."

Whatever doubt may exist as to whether this was intended as an indictment under section 1081 of the Code or chapter 171, Laws of 1914, the record shows that the district attorney regarded the crime as that defined by the last-named statute and, upon the conviction, had the jury to fix the punishment. The jury in convicting appellant fixed the punishment at three years in the state penitentiary, and from this conviction and the judgment based thereon appellant appeals. The record shows that the defendant and his father and the prosecutrix and both her parents met with the district and county attorneys at the courthouse on Monday of the week the trial was had and during the regular term of the circuit court and discussed a settlement of the trouble. The girl who claims to have been outraged was, according to the proof, only sixteen years of age and had given birth to a child. Appellant while protesting that he was not the father of the child, reluctantly agreed to marry the girl in settlement of the trouble. The two families agreed that this

Statement of the case.[112 Miss.

should be done and requested the district attorney to *nolle prosequi* the case on condition that appellant should marry the prosecutrix. Appellant, with reluctance, agreed, and for this purpose secured a marriage license, whereupon all parties and witnesses left the court. The prosecution was had before the circuit court of Forrest county sitting at Hattiesburg, while appellant was a resident of the adjoining county of Jones. Tuesday afternoon, less than twenty-four hours after the agreement for the marriage of the parties was entered into, the father of the girl reported to the court that the defendant had not executed his agreement, and he (the father) believed the defendant was attempting to get a continuance of the case without executing his agreement to marry his girl. Upon this *ex parte* report of the father of the girl the court directed a special officer to go after the defendant in Jones county and return him to court immediately. A special officer thereupon secured an automobile and pursued the defendant and returned him to court at Hattiesburg Wednesday morning. The case was thereupon called, and the defendant was put to trial without counsel or witnesses. When the case was called, a Mr. Pierce, member of the bar, made request in open court that time be granted the defendant to make a formal application for continuance, stating to the court that the defendant was not ready for trial at that time; that the defendant thought the case would be continued for the term; that the defendant was there without counsel and without a single witness, and was not prepared to go to trial at that time; that the defendant would not insist upon a continuance for the term, but would like to make an application to have his case set for another day of the term in order that his witnesses might be produced; that all the witnesses had been subpoenaed, but had been released under the agreement of marriage aforesaid. At this time a definite contract of employment had not been consum-

mated with Mr. Pierce to represent the defendant, the statement being made by Mr. Pierce to the court that the defendant "only spoke to me a few minutes ago." The representation made to the court on behalf of the defendant was that:

"It is not his desire or purpose to indefinitely postpone the case, but he would like time to make a showing as to why he is not ready to go to trial at this time. . . . My request is simply that the case be postponed long enough to give us an opportunity to make a showing as to why he is not ready for trial."

Thereupon the court announced:

"Your request is overruled. . . . The court, from the facts that are before the court, thinks substantial justice in this case would be that this little girl and the state of Mississippi have this case tried at this term of the court, this being the last day of the court, and unless the case is tried substantial justice is not done in the opinion of the court. For these reasons I am going to overrule the request of the lawyer, Mr. Pierce, to have the case delayed."

The record shows that the case was peremptorily called for trial and the application for the time in which to make a formal written motion for a continuance was on Wednesday, not the last day provided by law for the term, but a day which the trial judge fixed as the last day he intended to try any criminal cases. The defendant was then put to trial without assistance of counsel or of witnesses and attempted to conduct his own defense.

D. W. Draughon, for appellant.

Ross A. Collins, Attorney-General, for the state.

STEVENS, J., delivered the opinion of the court.

The refusal to grant the defendant sufficient time in which to prepare a formal application asking that

the trial be had at a later day of the term was, under the facts and circumstances disclosed by this record, manifest error. The defendant and his witnesses had been released Monday afternoon or night under an agreement that the case would be dismissed or passed to the files on condition that the defendant should marry the prosecutrix. The defendant was a resident of Jones county and his home a considerable distance from the county site of Forrest county where court was being held. It is shown that a marriage license had been issued but not used. It is impossible to determine from this record whether the defendant declined to execute the agreement, or whether he had sufficient excuse why the agreement had not been executed by Wednesday morning, the time when he was peremptorily put to trial without counsel or witnesses. He made due request of the court for sufficient time to prepare written application that the case be continued to a later day of the term—not an absolute continuance for the term—and this the court declined to grant. He was not permitted to state in writing his reasons for a continuance, but was put to trial without a single witness and before he had an opportunity to engage other counsel. In this condition of the record, counsel for the state cannot be heard to say there was no sufficient showing for a continuance. The record discloses that the defendant and his witnesses were released from further attendance upon the court until the marriage of the parties could be celebrated, and it seems to us that if this marriage, approved by the two families and the state's attorneys, was to settle the entire controversy, then there ought not to be a "military" wedding; but there should have been granted a sufficient time in which the rites of matrimony could be celebrated deliberately, decently, and orderly. It may be that appellant was not dealing in good faith, but this we cannot anticipate. He stands as a prisoner at the bar and should not be con-

demned without a fair and impartial hearing. We therefore do not think that the defendant was accorded that fair and impartial trial contemplated by the law of the land. The fact that this was the last day the court intended to devote to the trial of criminal cases should not militate against the interest of the accused. It was not in fact the last day of the term. It is unnecessary for us to comment upon any other assignment.

Reversed and remanded.

STATE EX REL. MELTON TAX COLLECTOR v. ROMBACH ET AL.

[73 South. 731, Division A.]

1. LICENSES. *Discrimination. Statute. Validity.*

Section 1, chapter 112, Laws 1914, imposing a privilege tax of two thousand dollars upon a money loaning business, where a greater rate of interest than 20 per cent. per annum is charged, is not violative of any provision of the state or federal Constitutions, either because the tax therein provided is imposed only on a business wherein a greater rate of interest than 20 per cent. per annum is charged, or because the tax is imposed only on a business made unlawful by another statute.

2. SAME.

Liability under section 1, Laws 1914, chapter 112, depends solely on that section and is not affected by the invalidity of other sections of the act, since this section is complete in itself and the act provides that if any section or part of the act shall be held to be unconstitutional or invalid, that fact shall not invalidate any other part of the act.

3. LICENSES. *Privilege tax. Persons liable. Agent.*

Under Laws 1914, chapter 112, section 1, imposing a privilege tax of two thousand dollars upon money loaning business, where a greater rate of interest than 20 per cent. per annum is charged, the manager and agent of the person conducting the business, who has no interest in the business is not liable for the tax.

Brief for appellant.

[112 Miss.]

APPEAL from the chancery court of Madison county.
HON. O. B. TAYLOR, Chancellor.

Suit by the state on relation of E. C. Melton, tax collector, against F. T. Rombach and others. From a judgment sustaining a demurrer to the bill and a decree for defendants, relator appeals.

The appellant, tax collector of Madison county, Miss., filed his bill in chancery against the appellees praying an attachment against one of the appellees, a non-resident, and for a decree for the privilege license fixed by section 1 of chapter 112 of the Laws of 1914. The defendants demurred, and demurrer was sustained, and an appeal taken from the decree in favor of the defendants. The section referred to reads as follows:

"Section 1. Be it enacted by the legislature of the state of Mississippi, that all persons, firms, or corporations doing a money loaning business, where a greater rate of interest than twenty per centum per annum is charged, whether secured or unsecured, or whether by taking bills of sale absolute or conditional shall pay a privilege tax to the state of two thousand dollars per annum, but nothing in this act shall be construed to validate, or make enforceable, or render lawful any contract for a loan of money at a greater rate of interest than twenty per centum, whether made before or after the passage of this act."

Geo. H. Etheridge, Assistant Attorney-General, for appellant.

The act of 1914 is founded both upon the police power of the state and the taxing power of the state, the taxing power being used in aid of the police power. The specific question at issue as to the power of the legislature to impose a specific tax on illegal business without legalizing the business has been settled contrary to the contention of the appellee, by many cases. See the case of *Foster v. Spee*, 111 S. W. 925, 22 L.

R. A. (N. S.) 949; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. St. Rep. 654; *Wells v. State*, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883; *State v. Funk*, 27 Minn. 318, 7 N. W. 359; *State v. Doom*, R. M. Charl. (Ga.) 1; *State v. Hipp*, 38 Ohio St. 199; *Butzman v. Whitbeck*, 42 Ohio St. 223; *State v. Tucker*, 45 Ark. 55; *State v. Brown*, 41 La. Ann. 771, 6 So. 638, 5 Wall. 462, 18 L. Ed. 497; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482; *Vermont Loan & Trust Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 49 Pac. 314.

In many of the American states the taking of usury is made a crime. 29 Am. & Enc. of Law, 560; *Youngblood v. Birmingham Saving & Trust Corporation*, 95 Ala. 521, 12 So. 579; 44 Century Digest, title "Usury," page 2499, sections 441 to 442; 19 Dec. Dig. title "Usury," section 146; *Ex Parte Berger*, 193 Mo. 16, 3 L. R. A. (N. S.) 530, 112 Am. St. Rep. 472; *Booth v. People*, 186 Ill. 43, 78 Am. St. Rep. 229, and case note to this report in the 87 Am. St. Rep.

The rule of the power of the states under the police power to prohibit acts deemed hurtful to the public morals, health, or general welfare is splendidly stated in the note to this case, in 78 American State Reports, page 237. *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329; *State v. Powell*, 58 Ohio St. 324; *State v. Harrington*, 68 Vt. 622, 627; *People v. Wemple*, 27 Am. St. Rep. 565; *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 337; *Harbinson v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682; *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 337.

The question of the power of the state to impose privilege taxes is almost without limit. The supreme court of Mississippi in the case of *Coco Cola v. Skillman*, 91 Miss. 683, says that the police power to impose taxes is one so unlimited in force and so searching in extent that the court scarcely ventures to declare that it is subject to any limits whatever, except such as rest in the discretion of the authority

which exercised it. It reaches to every trade or occupation, to every object or industry, use or enjoyment. In 2 Cooley on Taxation, page 1094, it is stated: "The sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property and tax that only, if in the opinion of the legislature that course will be wiser.

Our supreme court in the case of *Clarksdale Insurance Agency v. Cole*, 87 Miss. 637, 60 So. 228, held that section 112 of our Constitution, providing for equality and uniformity in taxation, applies only to *ad valorem* tax for general purposes and has no relation to privilege taxes. This holding was upheld fully by the supreme court in the case of *State v. Lawrence*, 66 So. 745.

It is also argued that the act is void because there is a lack of uniformity and equality according to value in the property which is sought to be taxed. As we have already said, it is not the property taxed, but the privilege of using the property, motor vehicles and cycles, on the public roads which is taxed. The equality and uniformity clause of the Constitution applies only to *ad valorem* taxes for general purposes, and has no relation to privilege taxes. In the case of *Clarksdale Insurance Agency v. Cole*, 87 Miss. 637, 40 So. 228, a statute imposing a privilege tax on each insurance agency and a tax on each insurance agent was upheld as constitutional. *Daily v. Swope*, 47 Miss. 367. It is also settled that it is competent for the legislature to tax any occupation or calling, according to its discretion, and if all of the same class are taxed alike, the constitutional mandate is complied with. *Bank v. Worrell*, 67 Miss. 47, 7 So. 219; *Holberg v. Macon*, 55 Miss. 112.

No infraction of the due process of law clause of either the state or the National Constitution is made

by the law in question in this statute. The question of due process of law as applied to taxation is discussed in Gray's Limitation on Taxing Power, sections 1122 to 1125, inclusive, and is discussed by the United States supreme court in numerous cases referred to and especially in the case of *Murrey's Lessee v. Hoboken Land & Investment Co.*, 18 How. (U. S.) 272, 15 L. Ed. 372; *Wilson v. North Carolina*, 42 L. Ed. (U. S.) 865; *People v. O'Brien*, 2 L. R. A. 258, but insofar as notice of the imposition of the tax is concerned, none is necessary, because the legislature has the taxing power and no person is entitled to a hearing before the legislature on this proposition. *Hagar v. Reclamation District*, 111 U. S. 71, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Rodge v. Kelly*, 88 Miss. 217; *Woodson v. Hopkins*, 85 Miss. 171; 37 So. 1000; 38 So. 298; 70 L. R. A. 645; *Gunning v. Chicago*, 177 U. S. 183, 44 L. Ed. 725.

The purposes for which the present law was enacted are so patent and the evils intended to be suppressed are so glaring that the law should be sustained if there is any reasonable way to sustain it.

W. H. & R. H. Powell, for appellees.

We presume that it will be conceded that the decree must be affirmed as to Frank T. Rombach, as it is charged in the bill that he was a nonresident of the state, had nothing to do with the lending of money; that all loan contracts were taken in the name of Ed. Rombach, and that he was the only one who did the business for which a privilege tax is required. If not, it must be conceded that Ed. Rombach is not liable for the privilege tax, as it is charged in said bill that he was merely the manager and agent of Frank T. Rombach.

So we take it that appellant will concede that the case should be affirmed as to either Frank or Ed.

Rombach, for certainly both are not liable for the privilege tax.

We will now endeavor to demonstrate that neither is liable and that the several demurrer was properly sustained and that the case should be affirmed in its entirety.

The bill shows that the business of appellees was jewelry, and not that they were engaged in or "doing a money loaning business," and hence they cannot be held for the two thousand dollar privilege tax, even if section 1 of said Act is constitutional.

Meaning of words. "Doing business" see 3 Words & Phrases, pages 2155-6-7-9 and 2160; "Doing a plumbing business," *Wilby v. State*, 93 Miss. 770; "Engage or engaged in business," 3 Words & Phrases, pages 2392-3-4; "Carry on business," 1 Words & Phrases, pages 979-980-1-2; "Transacting business," 8 Words & Phrases, pages 7058-9; "Business," 1 Words & Phrases, pages 915-16-17-920-1; 20 L. R. A. 186, (Read Second Column). The defendants, or at least one of them, was "doing a jewelry business" and not "doing a money loaning business." The other defendant was doing a jewelry business, and at times loaning money in connection therewith, as a mere side-line.

If we are in error here then we respectfully contend that the court was not in error in sustaining the demurrer because of the unconstitutionality of the act, for the reasons assigned in paragraphs, numbers 11 to 21 of the demurrer.

In the *Kelly Case*, 88 Miss. 209, our court held that the privilege tax on a person doing a money lending business securing the loans by bills of sale or designated kinds of personal property, such tax not being imposed on lenders otherwise securing their loans is class legislation and void, being violative of state Constitution 1890, sec. 14, providing that a person shall not be deprived of life, liberty or property without

due process of law, and of United States Constitution, Fourteenth Amendment, sec. 1, providing that a state shall not deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of laws. Section 2 of the act in question is clearly condemned by this decision. This decision construed Laws 1904, chapter 76, page 71, sec. 57, which imposed a tax of five hundred dollars on those who loaned money on Furniture, Jewelry, Silver, Glass, Plate or Ware, the court, in the concluding paragraph on page 218 said:

“It may be that no statute is needed to prohibit the kind of contracts condemned in *Woodson v. Hopkins*, *supra*, since the contracts condemned in that case were not contracts condemned because of usury, but contracts condemned, as clearly stated in that opinion, because they were so grossly exorbitant and iniquitous in all their features as to be void as against public policy. There is no need of a statute to prohibit contracts and business which the courts have declared void as against public policy. If, however, it was the purpose of the legislature to withdraw such contracts from the condemnation of being against public policy upon the condition of the payment by persons and corporations engaged in them of a very high license, it would still remain true that the statute enacted in that view must conform to the provisions of the Constitution of this state and the United States referred to.”

We say this paragraph is conclusive of case at bar in favor of appellees. The Law of 1914, chapter 112, page 91, is void also because it was clearly intended to be prohibitory, and is therefore in conflict with the said provisions of said constitutions. A purely revenue statute must not be unreasonable and prohibitory in its effect. This statute cannot be upheld on the ground that it is a police measure.

Even if the business condemned fell within the police power, yet the law was intended as a revenue measure and it must be confined to that and it cannot therefore be said to be a regulation under the police power of the state. It does not prohibit the business or out law it or declare that it is against the public policy of the state as does the anti-trust law. *Newman Case*, 59 Miss. 385; *Pitts Case*, 72 Miss. 184.

This law presents the anomaly and paradox of levying a tax for the privilege of doing business and then forbids the doing of that business, in effect, by making contracts entered into in such business non-enforceable.

"While the state legislature has broad powers to classify persons and property for legislative purposes, the mere fact of classification is insufficient to relieve statutes from the operation of the equality clause of the Constitution."

"A classification of persons or property in statutes must be based on some reasonable ground and some real difference, which bears a just and proper relation to the object sought to be accomplished; mere arbitrary selection and discrimination against persons and classes of unusual character is unconstitutional." *Adams Case*, 53 So. 692, and cases cited.

There is nothing "*malum in se*" in lending money at any rate that may be agreed upon by the lender or borrower. In fact, in 1873 it was the public policy of the state to deny the plea of usury. There was no such thing as usury in the lending of money by written contract, except in cases of decedents, minors and insane persons. See chapter 77, Laws 1873, page 81. So therefore it is merely "*malum prohibitum*."

The legislature in chapter 145, Code 1906, sec. 5002, (I) in dealing with "trusts and combines" declared that they were "inimical to the public welfare, unlawful and a criminal conspiracy." Not so in chapter 112, Laws 1914.

Clearly, this act is unconstitutional and void. " 'Tis true, 'Tis pity, and pity 'tis true" that the legislature was floundering about in the dark in enacting this law and they sought to avoid the consequences of their act by stating that "if for any reason any section or part of this act shall be held unconstitutional or invalid, then that fact shall not invalidate any other part of this act, but the same shall be enforced without reference to the part so held to be invalid."

This precaution of the legislature will not avail, because the portions that sting are clearly unconstitutional and the remainder, if upheld, will occupy a place of "*innocuous dessuetude*."

The argument of appellant in court below will not avail, as section 2 is clearly unconstitutional because of the special character of loans, the presumption of guilt is made to arise, and the reference to section 2 in section 3 being destroyed, makes section 3 inoperative and non-condemnatory of any act because of the elimination of the requirement of section 2.

Besides, section 2 destroys the presumption of innocence merely because certain classes of property are taken as security. Again section 3 in the cumulative imposition of fines and imprisonments for a petty misdemeanor is in violation of the sections of the Constitution cited supra. The district attorney, in the trial of the criminal case, admitted to the court that section 1 was unconstitutional.

In *Fant. v. Gibbs*, 54 Miss. 411 and 412, the court said: "While it is true that one portion of a law may be upheld while the rest is overthrown, this is only true when they are so far independent provisions that it may be presumed that the legislature intended one to subsist, even though the balance perished."

And again, "the principle is that when a particular clause of a statute is manifestly based upon certain other clauses, which are pronounced unconstitutional,

it will fall with them, though itself not obnoxious to constitutional objections.”

So we say that if section 2 is eliminated, then section 3 must fall even though it is of itself constitutional, because section 3 cannot become operative without the provisions of section 2.

SMITH, C. J., delivered the opinion of the court.

We are of the opinion that the bill sufficiently alleges that appellee Frank T. Rombach is engaged in “doing a money loaning business,” and that section 1, chapter 112, Laws 1914, does not violate any provision of the state or Federal Constitutions, either because the tax, therein provided is imposed only on a business wherein a greater rate of interest than twenty per cent. per annum is charged, or because the tax is imposed upon a business made unlawful by another statute. If authority is desired for the last of these propositions, it may be found in *Foster v. Speed*, 120 Tenn. 470, 111 S. W. 925, 22 L. R. A. (N. S.) 949, 15 Ann Cas. 1066.

Appellees’ liability depends solely upon section 1 of the statute, which is complete in itself; consequently we are not called upon to determine whether the other sections thereof violate either the Federal or state Constitutions, for the reason that the statute itself provides that:

“If for any reason any section or part of this act shall be held to be unconstitutional or invalid, then that fact shall not invalidate any other part of this act, but the same shall be enforced without reference to the part so held to be invalid.”

It is alleged in the bill that the business sought to be taxed “is the joint business of said Frank T. and Ed. Rombach, in that the said Ed. Rombach is the manager and agent of his brother.” If Ed. Rombach is simply the manager for and agent of his brother,

and the business does not belong to him, he is not liable for the tax. We will reverse and remand the case generally, however, in order that the state may amend the bill in this particular, should it see fit so to do.

Reversed and remanded.

NATIONAL SURETY Co. v. RIEVES.

[73 South. 732, Division A.]

1. **INSURANCE. Fidelity insurance. Bond. Construction.**

A provision in an employee's fidelity bond, that the bond should be invalid, unless signed by the employee, is a valid provision and binding unless the surety company has waived this provision or committed some act whereby it is estopped to claim immunity from liability under this condition of the bond.

2. **FIDELITY INSURANCE. Bond. Signatures by principal. Waiver.**

A written application by an employee for an employee's fidelity bond, which expressly stipulated that he would reimburse the bonding company for any loss sustained by it on account of the bond, did not constitute a waiver on the part of the company of the provision in the bond, that it would be invalid unless signed by the employee since the bonding company was not compelled to make the bond at all and it had the right to set forth in the bond the terms upon which it would be liable for the honesty of the employee.

3. **EMPLOYEE'S FIDELITY INSURANCE. Bond. Signature by principal. Waiver.**

Where a bonding company did not know that the principal had failed to sign an employee's fidelity bond issued by it, until after it was notified of the default, of the principal, when it at once notified the employer that it denied liability because of the failure of the principal to sign, although one renewal payment had been made to the company previous to this time, such facts did not constitute a waiver nor estop the bond company from setting up the defense that the principal did not sign the bond.

4. SAME.

Where a bonding company did not learn that the principal had failed to sign the bond until after a default and no further premiums were paid, it was sufficient to tender the collected premium for the first time in court.

5. INSURANCE. *Employee's fidelity. Insurance. Agents. Notice.*

Even though the principal in an employee's fidelity bond was a special agent to solicit business for the bonding company, yet in his application for his own bond as well as in his delivery of the bond to his employer he was not acting as the agent of the bonding company or of his employer, but for himself as the principal obligor in the bond and neither the bonding company nor his employer were chargeable with his acts or conduct in the delivery of the bond.

6. SAME.

It was the duty of his employer to examine the bond and familiarize himself with its conditions and see that it was properly executed in conformity with its conditions, and the employer was charged with a knowledge of the contents of the bond, from the time of its delivery to it.

7. DISCOVERY. *Notice. Sufficiency. Statute.*

Under section 1944, Code 1906, providing that if witnesses whose testimony is to be perpetuated are within the state, notice of the filing of a statement touching the matter as to which such testimony is desired, the names of the witness to be examined, the time and place of taking this testimony, shall be given to those represented in the statement as adverse parties in interest, a notice that a corporation through its officers "are required to answer, as provided by this section the following interrogatories," was not a proper notice and in such case neither the corporation nor its counsel was thereupon called upon to answer such interrogations under section 1938, which relates to obtaining the testimony of a nonresident party.

APPEAL from the chancery court of Holmes county.

HON. A. Y. WOODWARD, Chancellor.

Suit by J. A. Rieves, receiver of the Merchants & Farmers Bank, against National Surety Company. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

W. L. Dyer, for appellant.

E. F. Noel, for appellee.

SYKES, J. delivered the opinion of the court.

This suit was instituted in the chancery court of Holmes county by J. A. Rieves, receiver of the Merchants' & Farmers' Bank of Vaiden, Miss., against the National Surety Company for the recovery of ten thousand dollars, based upon a bond of the defendant company made payable to the Merchants' & Farmers' Bank, the said bond reading in full as follows:

"Know All Men by These Presents: That Samuel E. McConnico, Jr., as principal, and the National Surety Company, as surety, are held and firmly bound unto Merchants' & Farmers' Bank, Vaiden, Mississippi, employer, in the sum of ten thousand dollars, to the payment of which the principal and surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally. Signed, sealed and dated this 18th day of April, 1912.

"The condition of this obligation is such, that in consideration of the premium of twenty-five dollars, the surety agrees to reimburse the employer within three months after satisfactory proof of loss, for any pecuniary loss sustained by the employer by any act of fraud and dishonesty, including larceny or embezzlement, forgery, and misappropriation of funds, committed by the employee, in any position in the employer's service, during the term commencing on the 15th day of March, 1912, at twelve o'clock noon, and ending on the 15th day of March, 1913, at twelve o'clock noon.

"The following conditions shall be precedent to any recovery hereunder:

"(1) That the employer has no knowledge that the employee has been in arrears or in default in any position whatever; that if the employer or any officer becomes aware of the employee gambling, speculating or committing any disreputable, lewd or unlawful act, the surety shall be immediately notified thereof in writ-

ing at its Home office and that no act giving rise to a claim hereunder shall be condoned, nor any loss settled without the written consent of the surety first being obtained.

“(2) Upon becoming aware of any act which may be made the basis of a claim hereunder the employer shall give immediate notice thereof to the surety at its Home office by telegraph at surety’s expense and by a registered letter, and within ninety days after the date of said notice, file with the surety an itemized claim hereunder duly sworn to, and upon request produce for investigation all books, vouchers and evidence which the surety may require, and lend every assistance to bring the employee to justice.

“(3) Should the employer and surety disagree regarding the amount of loss sustained hereunder for which the surety may be liable, the matter may be arbitrated at the election of the employer through arbitrators consisting of one person appointed by the employer, and one person appointed by the surety. These two shall select a third person and the decision of the majority of said persons shall be binding and conclusive. The expense of such arbitration to be equally divided.

“(4) In the event of loss being sustained, the surety shall be entitled to share with the employer, *pro rata*, on the basis which the surety’s loss bears to the employer’s total loss, in any recovery by the employer upon or by reason of such loss from every source other than from the surety, and excepting any recovery upon or from other suretyship for such employee; and, likewise, in event of loss by the employer within the terms and provisions of this obligation and, in excess of the amount thereof, the employer shall be entitled to share with the surety *pro rata*, on the basis which the employer’s loss (i. e., in excess of the actual loss for which the surety is liable hereunder) bears to the employer’s total loss in any net recovery

(i. e., after expenses are deducted) by the surety from, upon or by reason of its payment of such loss.

“(5) That any settlement of any claim made hereunder shall operate as a complete discharge of the surety under this bond.

“(6) That the surety's liability hereunder shall cease immediately as to subsequent acts of the employee from and after (a) the 15th day of March, 1913; (b) discovery by the employer or any of its officers of any default hereunder on the part of the employee; (c) the employee leaving for any reason the services of the employer; (d) fifteen days after written notice mailed to the employer by the surety of its desire to withdraw as surety, and any claim of the employer against the surety must be duly presented to the surety not later than six months after any such termination of the surety's liability.

“(7) This bond may be continued from year to year by the payment of an agreed premium to the surety and the issuance of its continuation certificate, and provided that the liability of the surety shall not exceed the amount above written, whether the loss shall occur wholly during the term above named or during any continuation thereof or partly during said term or partly during any continuation thereof, and in case of any such continuation, the surety's liability on behalf of the employee shall be as continuous as if this bond had been originally written for a term, including the period of such renewal.

“(8) No action or proceeding at law or in equity shall be brought to recover from the surety any claim under this bond, unless commenced within a period of twelve months after the date the employer shall have given notice of claim.

“(9) This bond is invalid unless it be signed by the employee, and the premium charged actually be paid to the surety before the employer or any officer

shall have knowledge of any probable or actual default hereunder.

"In witness whereof, the said employee has hereunto set his hand and seal, and the said surety has caused this bond to be executed by its officers, and its seal duly affixed. . . . [Seal.] National Surety Company [Seal of National Surety Co. here] by M. Croake, Res. Vice President. Attest: J. Reynolds, Res. Asst. Secretary.

"Signed, sealed and delivered by the employee in the presence of"

The averments in the bill of complaint necessary to be noticed by us are as follows: That this bond was duly executed by the appellant company for a valuable consideration, and that after the said Rieves was appointed receiver of the bank he found the bond in the bank vault, and immediately made out the proper proofs of loss as required, but that the defendant company denied liability therefor. The defendant denied liability because of the fact that the principal in the bond, Samuel E. McConnico, Jr., had failed to sign and execute said bond. Clause 9 of said bond states:

"This bond is invalid unless it be signed by the employee, and the premium charged actually be paid to the surety before the employer or any officer shall have knowledge of any probable or actual default hereunder."

The chancellor rendered a decree for the amount sued for in favor of the receiver, from which decree this appeal is prosecuted.

The only contention of the appellant here which we care to notice is the one that the bond is invalid and void under section 9 of the policy because of the failure of the principal McConnico to sign it, and that therefore there can be no recovery on said bond. The appellee receiver contends, first, that the omission of the principal to sign this bond did not make the same invalid. The contract between the surety company and

the bank is an express contract. Its terms are set out in full in the bond. One of these terms in plain English absolutely states that this bond is invalid, unless it be signed by the employee. If this provision be a valid and binding one, then the receiver of the bank cannot recover on said bond, unless the surety company has waived this provision or committed some act whereby it is now estopped to claim immunity from liability under this condition of the bond. There are a number of cases cited by counsel for appellee to sustain his contention that the signature of the principal is not necessary, but after a careful examination of these authorities we find that most of them which hold that the signature of the principal is not necessary do not contain a provision similar to that in clause 9 of the bond. The case of the *American Bonding Co. v. Casualty Co.*, 125 Ill. App. 33, is an authority directly in point for the appellee. We find, however, that the great weight of authority is to the contrary, and both upon reason and authority we decline to adopt the rule announced by the Illinois appellate court. One of the leading cases in the United States upon this subject is that of *Union Central Life Insurance Co. v. United States Fidelity & Guaranty Co.*, 99 Md. 423, 58 Atl. 437, 105 Am. St. Rep. 313, decided in 1904. This was a suit upon a bond guaranteeing the honesty of an employee just as in the case at bar. The bond in that case contained the following provision:

"That it is essential to the validity of this bond that the employee's signature be hereunto subscribed and witnessed."

In its opinion the court in part says:

"The sole question in the case is whether the failure of the appellant's employee, whose fidelity was guaranteed, to sign the bond of indemnity, prevented the bond from becoming operative and effective. . . . If a recovery be permitted on this action, it must be had in spite of the definite provision that the bond

should not be binding unless signed by the employee whose fidelity it was intended to guarantee. The provisions which have been quoted above are declared in the bond itself to be 'conditions precedent to the right on the part of the employer to recover under this bond.' The liability of an indemnitor is measured by the contract into which he enters, and it is never enlarged by mere construction to include a term specifically excluded. Inasmuch as an indemnitor's liability is one dependent wholly upon contract it would be anomalous to hold that he is answerable under conditions directly contrary to the express stipulations of his undertaking. When he covenants to be bound provided certain antecedent conditions are complied with by the party indemnified, in the very nature of things, if those conditions are not fulfilled his liability never becomes fixed. This is so elementary that we do not pause to cite authority in support of it. Giving to the bond of indemnity the most liberal construction contended for, treating it in point of fact as closely akin to a technical policy of insurance, we cannot understand how the indemnitor can be held accountable upon it in the teeth of the explicit covenants that it should not be answerable unless designated provisions distinctly declared to be conditions precedent to the validity of the bond have been first complied with, when they have not been observed at all. It is true that an indemnitor may waive conditions inserted for its protection, but there is no averment in the declaration of any such waiver. The renewal receipts are explicitly declared to be subject to all the covenants and conditions contained in the original bond; and if the bond itself was inoperative by reason of the failure of the indemnified to have its employee sign it, the renewal receipts could not give it validity. The renewal receipts in terms reasserted the provisions of the bond, and do not purport to continue the bond in force without reference to the conditions upon

the observance of which its validity in the first instance depended. . . . The life insurance company, the indemnified, cannot complain that there is any hardship inflicted upon it by holding the bond to be invalid by reason of the failure of its own employee to sign it, because it had possession of the bond and had control of its employee whose fidelity was guaranteed, and the failure to secure that employee's signature was due to its own omission or default alone. The indemnity company had the right to make its undertaking depend, as respects its validity, upon the condition that the indemnified's employee should sign the bond. The condition was not unreasonable or illegal. The performance of it was within the power of the indemnified. The neglect or omission of the latter to comply with that condition precedent cannot be ignored when relied on by the indemnitor, and cannot give efficacy to an instrument which by its unequivocal terms was not to become operative until that specific condition was complied with."

This case is also reported in 105 Am. St. Rep. 313. To the same effect are the following authorities: *Adelberg v. U. S. Fidelity & Guaranty Co.*, 45 Misc. Rep. 376, 90 N. Y. Supp. 465; *Platauer v. American Bonding Co.* (Sup.), 92 N. Y. Supp. 238; *Building & Loan Association v. Obert*, 169 Mo. 507, 69 S. W. 1044; *Blackmore v. Guarantee Co.*, 71 Fed. 363, 18 C. C. A. 77; *U. S. Fidelity Co. v. Ridgley*, 70 Neb. 622, 97 N. W. 836.

It is contended by counsel for the appellee that because of the fact that McConnico had made written application to the appellant bonding company to make this bond, and in that application expressly stipulated that he would reimburse the bonding company for any loss sustained by it on account of making the said bond, that it was therefore unnecessary for him to sign the bond. The answer to this contention is simply that the bonding company was not compelled to make this bond

at all, that it was a purely voluntary undertaking upon its part for a valuable consideration, and that it had a right to set forth in the bond the terms upon which it would be liable for the honesty of the employee. The matter contained in the application for the bond had nothing whatever to do with this particular clause inserted in the bond. This question was discussed in the *Obert case, supra*, as follows:

“It is said in the brief of the learned counsel for respondent: ‘The only practical reason why Obert should sign the bond at all was that in case of default the company might have his written obligation to reimburse them.’ And in that connection attention is called to the written application of Obert for the first bond in which he obligates himself to reimburse the defendant corporation for all loss, etc., that might occur on the bond or on any renewal thereof. If the only purpose in signing the bond as principal was as suggested by counsel, the clause in the application referred to would seem to cover the omission. But the practical effect of the signature by the principal is more than is suggested. It would authorize the plaintiff to sue and recover in one judgment against him as well as the surety, and such judgment would obviate the necessity of another suit by the surety on the collateral agreement.”

There was no waiver because of said written application on the part of the appellant bonding company of the employee's signing the bond. There was one renewal payment made to the company before the bank went into the hands of a receiver. At that time, however, the appellant bonding company did not know that the principal had failed to sign the bond. After the appellee receiver notified it of the default of McConico, an agent of the appellant company went to Vaiden, and for the first time discovered that the principal had failed to sign said bond. Notice was at once given to the receiver both by the agent then

at Vaiden, and also from the home office of the appellant company that the company denied any liability because of the failure of the principal to sign the bond. Nothing was done by the appellant after it found out that the bond was not properly executed to constitute a waiver or to estop it from setting up this defense. It is also contended that the company should have tendered at once the return premiums to the receiver of the bank upon a discovery of the failure of the principal to sign the bond. After this failure was discovered; however, no premiums were paid by the bank, and there was no reason why this tender or offer to return should have been made before it was made in court.

The bonds of the appellant company could not be executed by any of its agents in Mississippi, but had to be executed at its principal home office. The testimony in this case shows that this bonding company had a state agent in Mississippi who resided at Holly Springs. This agent was without any authority to make bonds of this character for the company. This state agent employed in the different towns of the state special agents to solicit business for the company. One of these special agents was the cashier of the bank, McConnico. When the bond, upon which this suit is based, was executed in New York, it was sent to Mr. Smith, the state agent at Holly Springs, who in turn sent it to McConnico to be delivered to the bank. It is here contended by the appellee that McConnico in dealing with this bond was acting as the agent of the bonding company, and not as the agent of the bank, and that the knowledge of his failure to sign the bond is therefore chargeable to the bonding company. In his application for this bond, as well as in his delivery of the bond to the bank, McConnico was acting neither as the agent of this company nor of the bank, but acting for himself as the principal obligor in the bond. Neither the bonding company nor the bank

were chargeable with his acts or conduct in the delivery of this bond. It was the duty of the bank as his employer to see that he properly executed the bond when he turned the same over to the bank. He was employed by the bank and under the management and control of the bank. The testimony shows that he handed this bond to the president of the bank, stating at that time that it was as good as gold, or words to that effect. It was the duty of this bank president to examine the bond and familiarize himself with its conditions and see that it was properly executed in conformity with these conditions. Whether he examined it or not, the bank is charged with a knowledge of its contents from the time of its delivery to its president. There is nothing harsh or severe about this condition in the bond. When the president of the bank failed to examine the bond he did so at the peril of the bank, and the bank must now suffer for his neglect. *U. S. F. & G. Co. v. Ridgley*, 70 Neb. 622, 97 N. W. 836.

It is also contended by appellee that the court below should have rendered a decree in its favor because the appellant failed to answer certain interrogatories propounded to it under section 1938 of the Code. An examination of these interrogatories, however, shows that in them the counsel for appellee stated that the National Surety Company, through its officers, "are required to answer, as provided by section 1944 of the Code, the following interrogatories." Section 1944 of the Code relates to the taking of the testimony of witnesses whose testimony is to be perpetuated. The notice given to the counsel of the appellant was not a proper notice to perpetuate this testimony under section 1944. No mention is made in this notice of section 1938. Neither the appellant surety company nor its counsel were therefore called upon to answer these interrogatories under the last-named section. The appellee receiver specified in his notice the section of

the Code under which he was proceeding, and no duty whatever devolved upon the appellant surety company to examine any other section of the Code than the one mentioned in this notice. We have not set out in detail all of the pleadings had in this case, but only those sufficient to a correct understanding of this opinion. In conclusion we wish to say that the failure of the principal to sign the bond, in direct violation of section 9 of said bond, invalidates the same, that the appellant company has not waived this condition of the bond, and that it is in no way estopped from taking advantage of it in this suit.

It therefore follows that the decree of the lower court is reversed, and a decree dismissing the bill will be entered here.

Reversed.

SMITH ET AL. v. WHITTINGTON.

[73 South. 785, Division A.]

EJECTMENT. Pleading. Variance. Statute.

The effect of section 1827, Code 1906, is to confine the plaintiff in ejectment to a recovery upon the title outlined in his bill of particulars and where plaintiffs in ejectment in their bill of particulars deraign title by inheritance from their father who it is claimed acquired title by adverse possession, they are confined to the title thus outlined, and cannot recover by showing a different title derived by inheritance from their mother.

APPEAL from the circuit court of Franklin county.

HON. R. E. JACKSON, Judge.

Suit in ejectment by C. C. Smith and others against L. A. Whittington. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Theo McKnight, for appellant.

The case of *Nowles v. Hall*, 28 Mich. 274, has no application here, because appellants are not claiming under title arising after the commencement of this suit, as were the facts in the case cited.

If appellee desired to stand on the presumption in favor of his possession until appellants showed title, then he should have "said nothing."

Had appellee stood on this presumption and said nothing, then this case should have gone to the jury on the undisputed testimony contained in the direct examination of appellants' witnesses, for the jury to say whether this testimony was sufficient to establish the fact of adverse possession in W. C. Smith, the husband. But, appellee did not choose to stand on this presumption and say nothing and await the failure of proof of title by appellants. Rather than do this he undertook to confuse the court and jury by undertaking to show, that Mrs. Smith, the wife, who outlived the husband for some twenty years, was the one in possession, thus leaving this case, at its close, as shown by the record, in the court below, in an attitude which required the court below to give a peremptory instruction for the appellants.

To extricate himself from this position, he now, in this court, for the first time, says that he did not think about Mrs. Smith not being John Doe or a stranger, and did not realize that she was the mother under whom appellants claim. (Please see bill of Particulars.) And, this situation dawning upon him, he again says, for the first time, that it was not the purpose, intent and effect of the testimony brought out on cross-examination, to show title in Mrs. Smith, but simply to dispute title in Mr. Smith, without showing title in Mrs. Smith, he repudiates all responsibility for this proof, and says that it was not his proof, but the proof of the appellants. Now, it is most respect-

fully submitted, that if this was appellee's proof, then he is bound by it; and if it is appellants' proof, then appellee is bound by it because he brought it out himself, and without objection from himself. Appellants did, for a while, object to this testimony, but their objections were overruled, and when it appeared to their counsel that appellee was determined that they should take their land through their mother instead of through their father, the appellants then joined with the appellee in showing that the mother had title, which was done without objection by the appellee.

It is by the objection to testimony, alone, that error may be predicated upon the fact that testimony varies from the bill of particulars.

It follows, therefore, that from every standpoint, appellants were entitled to the benefit of the proof of title by adverse possession, in Mrs. A. J. Smith, from whom they claim (see bill of particulars) although they did not technically allege that she acquired by adverse possession.

A careful reading of appellee's bill of particulars will show this honorable court, that appellee sets up no title whatever to the land in dispute, yet he seeks by a strict and technical construction of the law governing bills of particulars, to withhold from the true owners, property to which he does not even set up title in his bill of particulars. He should be compelled to live up to the rule which he invokes.

Whittington & McGehee, for appellee

Appellants, having based their title and claim of right of possession of the land therein involved, on a title alleged to have been acquired by W. C. Smith by virtue of adverse possession and claim of ownership for the statutory period, must rest their title and right to recover on that allegation of title.

Counsel for appellants in seeking a reversal of the judgment of the trial court in this cause, has entirely abandoned the claim of title in W. C. Smith—and we make this statement advisedly, for if he has not he ought to say so, and not say to the contrary,—and here now claims title to have been shown to be in Mrs. A. J. Smith, and departing from his usual custom of claiming everything by adverse possession, claims to have proven title in Mrs. A. J. Smith as the sole owner of the property, himself; for in his brief counsel argues that “under a strict construction of appellants’ bill of particulars, appellee might have objected to appellants proving title by adverse possession in Mrs. A. J. Smith. By this rather-a-disposition-to-claim-everything statement counsel for appellants commits himself to the truth of the following propositions, viz; (101) that title to the property in question was proven to be in Mrs. A. J. Smith and not W. C. Smith, and (2) that under his bill of particulars he could not properly nor legally prove title in Mrs. A. J. Smith and recover possession of the property in this cause thru claim of title in her; it follows, therefore, that counsel is committed to the correctness and propriety of the judgment of the lower court in refusing to permit or allow him to do that which he could not do legally, and that the judgment of the court was proper and ought to be affirmed; a most remarkable commitment in view of the fact that he now seeks to have the selfsame judgment here reversed and set aside.

Appellants, not having averred title in Mrs. A. J. Smith solely, in their bill of particulars, cannot recover on the strength of a title not declared therein. Section 1827 of the Code of Mississippi, 1906; *Goforth, et al. v. Stingily, et al.*, 30 So. 690. In the case cited the court said: “Defendants were presumed by law to be in the rightful possession until the plaintiffs showed title, and, until this was done, they need say nothing, and plaintiffs could not, on the evidence they adduced,

travel outside the boundaries of the bill of particulars they did file." It was a complete defense to the claim of title asserted in W. C. Smith by the bill of particulars, for appellee to show, even by appellants' witnesses, that Mrs. A. J. Smith was in possession of the land and was actually occupying the same under deed of conveyance, at the very time it was alleged that W. C. Smith, without color of title, acquired title thereto by actual occupancy and possession thereof himself.

E. H. Ratliff, for appellee.

To state this case accurately, as shown by the record, is simply this. The plaintiffs claim title by adverse possession, acquired by W. C. Smith. Their right to recovery was based upon W. C. Smith's title by adverse possession. If they fail to show this, it ended the plaintiff's case. It was incumbent upon them to show title in W. C. Smith, not in someone else, and failure to show title in W. C. Smith, by adverse possession in accordance with their bill of particulars, was a failure to show a right of recovery, and there was nothing for the court below to do in such event but to give an instruction to find for the defendants, and this is true, though the defendant might not have had any title at all.

To hold now, after this question was raised for the first time in the supreme court, that the plaintiffs might shift their ground and claim under a different source of title from that pleaded, would be to deny the defendant his day in court and take his property without due process of law.

The case attempted to be now tried in the supreme court is a different case from that tried in the court below. A new chain of title and a new source of title, is set up in the supreme court from that which was set up in the court below and upon which the case was tried, and it is respectfully submitted that this is not

only in violation of law, but is unjust in that it deprives the defendant of the opportunity to meet this new chain of title introduced for the first time in the supreme court, and we respectfully submit that the judgment of the lower court should be affirmed.

SMITH, C. J., delivered the opinion of the court.

This is a suit in ejectment wherein in the court below appellants were plaintiffs and appellee was defendant. In their bill of particulars or abstract of title filed pursuant of a demand therefor appellants deraign title through their father, W. C. Smith, who, they claim, acquired the land in controversy by adverse possession and died leaving his widow, the mother of appellants, now dead, and appellants as his only heirs at law. It appears beyond question from the cross-examination of the witnesses introduced by appellants that W. C. Smith acquired no title to the land by adverse possession, but that his wife, A. J. Smith, purchased it along with other lands from F. C. Huff, who put her in possession thereof, but failed to include it in the description of the land contained in the deed executed by him to her, she remaining in possession thereof claiming it as her own for more than ten years. In appellee's bill of particulars or abstract of title an attempt was made to deraign title to the land by *mesne* conveyances from Mrs. Smith, but the same error appears in the description of the land in the deed by which she parted with the title thereto as in that by which she acquired it. Appellants rested their case without then or thereafter requesting leave of the court to amend their bill of particulars to correspond with the proof. No evidence was introduced by appellee, but at his request that introduced by appellants was excluded, and the jury peremptorily instructed to find for him.

The contention of appellants is that it is immaterial whether title to the land was in their father or mother;

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Opinion of the court.

for they became the owners thereof by inheritance in either case. This argument overlooks the effect of section 1827 of the Code, which is to confine the plaintiff in ejectment to a recovery upon the title outlined in his bill of particulars.

Affirmed.

REES v. STATE.

[73 South. 785, Division B.]

HOMICIDE. *Murder. Question for jury.*

Under the facts as set out in its opinion in this case the court held that the evidence was sufficient to go to the jury on the question as to whether or not defendant was guilty of murder.

Appeal from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Sam. E. Rees was convicted of murder and appeals. The facts are fully stated in the opinion of the court.

Salter & Hathorn, for appellant.

Earle N. Floyd, Assistant Attorney-General, for the State.

Cook, P. J., delivered the opinion of the court.

The appellant was indicted, tried, and convicted of the murder of one Wiley Blackburn, in the circuit court of Lamar county, and appeals from the judgment of that court, sentencing him to imprisonment in the penitentiary for the term of his natural life.

The attorney-general, and counsel for appellant are so wide apart in their interpretation of the evidence introduced at the trial that we have read the evidence with unusual care. Counsel for appellant earnestly insists that the evidence did not, in any respect, authorize

the trial court to submit the question of whether or not the defendant was guilty of murder to the determination of the jury. The attorney-general, on the other hand, as earnestly insists that the jury was fully warranted in returning the verdict it did return, and that no other verdict would be responsive to the evidence. It seems to us, if we eliminate the story of appellant of what occurred just a few minutes preceding the homicide, the verdict of the jury was inevitable. The evidence warranted the jury in believing that the killing was but the culmination of an old feud growing out of rivalry between appellant and the deceased in the newspaper business; that appellant had written and printed in his paper an article which the deceased believed was directed at him, and which he construed as a malicious and veiled attempt to bring him into contempt. The facts warranting this inference are gathered from defendant's own testimony. Defendant told the jury that the deceased had made several verbal assaults upon him about this article, and had invaded the sanctity of his person on more than one occasion. So, if we take the evidence colored by the previous aggressive acts and add deceased's aggressiveness on the fatal day, the impartial mind might reach the conclusion that appellant, smarting under the indignities of the past, determined then and there to end the matter, and deliberately shot and killed Mr. Blackburn, at a time when he was in no real or apparent danger of losing his life or receiving great bodily harm at the hands of deceased. The outstanding fact is that he killed an unarmed and defenseless man.

The court, we think, was liberal in his instructions to the jury, and especially in giving the instruction defining manslaughter, at the request of the state.

We, of course, are not authorized to give our verdict on the evidence, and what we have said is merely responsive to the argument of counsel.

Affirmed.

TATUM v. GARRETT.

[73 South. 786, Division B.]

CONTRACTS. *Performance. Tender.*

Where in an action for the balance of the contract price for boring an oil well, defendant claimed as a defense that plaintiff had refused to deliver a book kept by him, showing the strata through which he had drilled as he agreed to do, a tender of a copy of such book before suit was a substantial compliance with the contract and a tender of the book itself after suit which defendant refused was a full compliance and plaintiff was entitled to a peremptory instruction for the balance due on the contract.

Appeal from the circuit court of Forest county.
HON. PAUL B. JOHNSON, Judge.

Suit by W. A. Garrett against W. S. F. Tatum. From
a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

S. E. Travis, for appellant.

Sharborough & Bullard, for appellee.

COOK, P. J., delivered the opinion of the court.

PER CURIAM. *Affirmed.*

ON SUGGESTION OF ERROR.

Appellant suggests that the decision of this case may affect other suits pending between the appellee and W. O. Tatum, son of appellant, and for that reason this court should have written an opinion, giving its reasons for affirming the judgment of the court below.

The case was affirmed because we believed that the trial court did not err in directing the jury to find for the plaintiff below. Appellee was employed by appellant to bore an experimental oil well. The price to be paid was agreed to before the work began. Several

months elapsed, and the record shows that appellant construed his contract to mean that appellee was to receive two hundred ten dollars per month, a month to be computed as thirty days. At the end of each thirty days, appellant delivered to appellee his check for two hundred and ten dollars, and at the conclusion of the job appellant had written his check payable to appellee for ninety-eight dollars being balance due appellee, computed upon the same basis. When appellee was about to quit, appellant's son and agent demanded of the appellee that he deliver to him a book, which appellant claims appellee contracted to keep and did keep, showing the number of feet bored in the ground and the varying geological strata bored through.

Appellant's son testified that appellee refused to deliver this book, and he refused to pay him the balance due; that the delivery of the book was a material part of the consideration for the contract. It appears that this book contained valuable information to geologists, and would largely control their advice as to whether or not appellant would be justified in boring other wells in that vicinity; that if an expert should, after an examination of the data recorded in the book, advise further borings, appellant might have followed his advice, and might have won a fortune, or, on the other hand, he might have sunk a small fortune in a hole in the ground. The record shows that appellee refused to deliver the book, as stated by appellant's son; but it also shows that appellee offered to give appellant a copy of the book. The record also shows that the book itself was tendered, after this suit was brought, and appellant refused to accept same. This suit was brought by appellant to recover for the agreed price of his labor.

We think that the offer of a copy of the book was a substantial compliance with the contract, and the tender of the book itself was a complete compliance. It is also a matter of doubt whether the failure to deliver

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Brief for appellant.

the book caused any damages to appellant. The damage alleged is purely conjecture. Instead of being an asset, the book may and probably would have been a liability. However, we think the record shows very clearly that appellee complied with his contract. We did not hold, and do not now hold, that appellant could not recoup in damages for appellee's alleged breach of contract. We do hold that we find no error in the rulings of the trial court excluding the evidence offered in support of appellant's recoupment.

Overruled.

YOUNG v. STATE.

[73 South. 786, Division B.]

CRIMINAL LAW. *Motion in arrest of judgment. Grounds.*

As "Charity covers a multitude of sins" in the domain of morals, so a verdict of a jury in Mississippi covers a multitude of defects in pleadings; and it is only in cases where the indictment is a nullity, because of insufficiency, that a motion in arrest of judgment can be entertained at all.

Appeal from the circuit court of Alcorn county.

HON. CLAUDE CLAYTON, Judge.

Walter Young was convicted of robbery and after verdict of conviction, moved the court to arrest judgment, which being overruled, he appeals.

The facts are fully stated in the opinion of the court.

W. C. Sweat and W. J. Lamb, for appellant.

This motion in arrest of judgment was by the court overruled; it should have been sustained. This court has held that; "A motion in arrest of judgment brings into question the sufficiency of indictment on every ground, whether specifically assigned or not."

Denley v. State, 12 So. 698. In the above case, CAMPBELL, C. J., speaking for the court, said: "Although this specific objection was not made a special cause for demurrer on the motion in arrest of judgment, and was not made in argument here, since the demurrer and motion bring into question the sufficiency of the indictment on every ground, whether specifically assigned or not, we are constrained to pronounce it bad for the reason given."

A motion in arrest of judgment will be sustained on any ground which is apparent in the face of the record. A motion will not be sustained on a ground which is not apparent in the face of the record. It has been repeatedly held by this court that, when a motion in arrest of judgment was made apparent in the face of the record, the motion will be sustained. *Howard v. State*, 13 S. & M. 261, 1. Mor. St. Cas. 465.

The only charge asked for by the state in the case at bar failed to charge the jury that they must believe that the robbery was committed by violence to the person of Lon Potts (Rec. p. 25), and this fatal defect in the state's only charge was not cured by any charge asked for and given on the part of the defendant, nor was the jury told that it must believe that Potts was robbed by the defendant by violence of his person. This was fatal in the trial of this cause, and was made the fourth ground of the appellant's motion in arrest of judgment, and for this reason the motion in arrest of judgment should have been sustained.

Ross A. Collins, Attorney-General for the state.

Opposing counsel contend that the indictment was fatally defected because it failed to allege that the robbery was committed by violence to the person alleged to have been robbed or "by putting such person in fear of some immediate danger to his person." After verdict of guilty was rendered, appellant filed a motion in arrest of judgment which was overruled.

It was too late to object to the sufficiency of the indictment by motion in arrest of judgment, after the trial had proceeded to judgment. This should have been raised by demurrer. Section 1413, 1426, and 1508 of the Code of 1906. *Wilkinson v. State*, 77 Miss. 705; *Norton v. State*, 72 Miss. 128; *Burnett v. State*, 72 Miss. 994; *Gates v. State*, 71 Miss. 874; *Rocco v. State*, 37 Miss. 357.

The case of *State v. Presley*, 91 Miss. 377, is directly in point with the case at bar. In that case there was a trial and conviction, and then a motion in arrest of judgment which was sustained and the state appealed. The indictment charged that the defendant "unlawfully, feloniously, forcibly and violently did rob and steal and take from the person of William Knight, to wit, one pistol, etc." Judge CALHOUN, speaking for the court said: "Of course, it is not necessary that the person robbed should have been put in fear where the goods were taken from his person. *Smith v. State*, 82 Miss. 793, 35 So. 178. Taking the property from, and by violence, to the person is one thing under the statute, and putting the person in fear of injury is another.

The omission of the word "assault" is not fatal here, because the charge is of acts which are in fact an assault. An assault is a conclusion of law from acts done, and our statute on robbery does not make it necessary to aver it technically, nor did the common law.

The violence is sufficiently charged, if it were necessary and according to 2 Bishop on Criminal Procedure, par. 1004, an indictment without it may be good if the meaning is otherwise conveyed. The same authority in paragraph 1005 distinctly says that "putting in fear" is essential only where there is no force; and so Mr. Bishop says in paragraph 1006 that the term "against his will is not essential." In the case before us we think the indictment charges a condition of things manifestly

against the will of the party robbed. Technical law is good law under proper circumstances, but not where it shocks common sense. One cannot "unlawfully, feloniously, forcibly, and violently" rob and steal from the person of another, without its being against his will; and here it cannot be said that, though that is an infallible argument that it is against the will, still it is not perfectly charged. Such a doctrine cannot be invoked where the terms of the statute are otherwise duly covered. The exact language of the statute need not be used, where what is tantamount is fully set out.

The ruling below in our opinion was incorrect, and we reverse it, and remand the case, with instructions to the court below to sentence the accused on the conviction under the indictment against him.

It will be noted that in the indictment in the *Presley Case*, *supra*, the word "assault" was omitted and the court held that its omission "is not fatal here, because the charge is one of acts which are in fact an assault." In the case at bar the word "assault" is not omitted, but even if it had been under the above rule the indictment would be good.

ETHRIDGE, J., delivered the opinion of the court.

Walter Young was convicted in the circuit court of Alcorn county on a charge of robbery and sentenced to the penitentiary for five years. There was no demurrer to the indictment, nor motion to quash, but after the jury had returned a verdict of guilty motion was made in arrest of judgment, and it is now complained that the indictment does not sufficiently charge violence to the person of the person robbed. The statutes of the state provide two methods of raising questions as to the sufficiency of the indictment: First, where the defect appears on the face of the indictment, it must be taken by demurrer, and not otherwise; and where the defect does not appear on the face of the

indictment, must be by motion to quash. Sections 1426 and 1427, Code of 1906. As "charity covers a multitude of sins" in the domain of morals, so a verdict of a jury in Mississippi covers a multitude of defects in pleadings; and it is only in cases where the indictment is a nullity, because of insufficiency, that a motion in arrest of judgment can be entertained at all.

This case is exactly parallel with *State v. Presley*, 91 Miss. 377, 44 So. 827, and the judgment is affirmed.

Affirmed.

TOWN OF CARROLLTON v. VANCE.

[73 South. 787, Division A.]

SCHOOLS AND SCHOOL DISTRICTS. School Taxes. Duty of collector.

Where any municipality, together with separate adjacent annexed territory, constitutes a separate school district, under the provisions of chapter 118, Laws 1914, it is the duty of the municipal tax collector, and not the sheriff, to collect the separate school district taxes levied upon property situated in such separate adjacent annexed territory.

Appeal from the circuit court of Carroll county.

HON. H. H. RODGERS, Judge.

Proceeding by the Town of Carrollton against W. B. Vance, sheriff and tax collector. From a judgment of the circuit court reversing the action of the municipal board directing the collector to collect certain school taxes, and dismissing the proceeding, the town appeals.

The town of Carrollton, being a municipality of more than three hundred inhabitants, by its board of mayor and aldermen was declared to be a separate school district, and the said board added to said school district certain territory adjacent to said town, under the provisions of section 4013 of the Code of 1892, then

Brief for appellant.

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in force. Taxes for the support of the schools of said district were levied by the board for the year 1914, and, not having been paid, the board of mayor and aldermen passed an order directing the tax collector of the county to collect said taxes by distress if not promptly paid. Appellee, tax collector of the county, filed objections to this order of the board, which were overruled, and the taxes charged against him by the board, and he appealed to the circuit court, where the action of the municipal board was reversed, and the proceedings dismissed. From that judgment comes this appeal.

Hughston & McEachern, for appellant.

Is the county tax collector the proper official to collect the taxes in the added territory and does the municipal board have the right to exercise any authority over him to require him to make such collections? Section 4533 of the Code of 1906, furnishes a complete scheme for adding territory to a municipal school district and said section has never been amended nor repealed and among other things provided in that section is the following: "The school taxes in such added territory shall be collected by the county tax collector and deposited with the municipal treasurer of the district." We find nowhere in the law any other official designated as the one to collect the separate school taxes in the outlying territory. In fact, under the rulings of our court the sheriff is the only tax collector for the county at large.

Counsel for the appellee relied in the lower court on chapter 101 of the Laws of 1908, as a repeal of said clause where it says in section 3: "That all laws and parts of laws in conflict with this act are hereby repealed, and it further says that such property shall be assessed and the tax collected in the same manner as the property within the corporate limits. We contend

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Brief for appellant.

that this does not repeal the law making the county tax collector the collector of these taxes; because, First, chapter 101, Laws of 1908, does not treat of the same matters as section 4533, but it is more amendatory of section 4533. It speaks of the manner of assessment and collection and not of the official whose duty it is to make the assessment or collection. The two sections, therefore, are not in conflict but are entirely consistent with one another.

Second, if the construction is given to the said chapter 101, that counsel would place upon it, then the person to make said collections would be the marshal of the town of Carrollton under section 3424 of the Code of 1906, being the municipal tax collector and the one to make the collections within the municipality. If he is made the collector of the school taxes beyond the limits of the municipality, then the statute would have the effect of extending his territorial authority; and it is laid down that the rule of construction of municipal authority is strict and the power must be expressly conferred or necessarily implied or it cannot be sustained. *Adams v. Greenville*, 77 Miss. 881.

It is not here contended that the authority to collect taxes beyond the municipal limits is expressly conferred upon the marshal of the municipality, nor can the use of the words "in the same manner" create a necessary implication, because the words "in the same manner" refer entirely to the mode of procedure or the way of doing the thing and the general method, and not to the persons by whom it is done. 26 Cyc. 516. *Anderson's Dictionary of Law*, 653. 7 Words & Phrases, page 6323, in which the following language is used: "The phrase 'in the same manner' has a well-understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure. It means similar proceedings, so far as such proceedings are applicable to the subject-matter." Besides the

town marshal can have no jurisdiction beyond the corporate limits. *Riley v. James*, 73 Miss. 1.

In the case of *Riley v. James*, *supra*, the following language is used: "If, therefore, it be conceded that Whittington might, as constable, have executed such warrant within the limits of the municipality for which he was marshal, it would yet be true that he had no official authority without the town, and that the seizure and sale of property at Bee Lake was invalid and no title to the property passed to the purchaser at such sale."

If the marshal of the town of Carrollton did not then have the authority to make such collections, and there is no power to confer such authority upon him under the constitution as construed in *Riley v. James*, *supra*, then the authority could not be conferred upon him; what other official would have the authority to collect such taxes? Naturally the sheriff, as tax collector of the county, having the general authority to collect taxes within the county, except municipal taxes, within the municipality would be the proper official. His jurisdiction for the purpose of the collection of taxes is concurrent with the county, while that of the town marshal is limited to the municipal lines. The legislature, therefore, in section 4533, *supra*, very wisely imposed upon the county tax collector, the duty to collect the taxes levied on outlying territory. If the duty was imposed upon him and the municipal authorities of the town of Carrollton were required to make the levies, then it was his duty to report to said municipal authorities and to act under their authority and instructions.

T. O. Yewell, for appellant.

Who is the proper officer to collect taxes from the inhabitants of adjoining territory which has been added to a separate school district composed of municipality

and such added, adjoining territory? I have been unable to find any statute which expressly delegates this power to any officer except section 4533, Code of 1906. That statute expressly gives the authority to the "county tax-collector." Referring to the statute as contained in Code 1892, it will be observed that the word "counties" is followed by a comma. By inadvertence, I suppose, the comma was dropped in the print of the statute in the Code of 1906. Supplying this comma, the true meaning of the statute is readily seen. The word "adjoining" qualifies not "county or counties" alone, but the whole preceding phrase "Any part of a county or counties." It does not mean that the county or counties must adjoin, but that part of a county or the parts of counties to be added must lie adjoining the municipality. The subject of the statute is in the following words, to wit: "Territory to be added to separate school district," showing conclusively that the subject-matter dealt with is the "territory to be added" and not the county or counties. Under this construction, which I submit is the correct one, a school in the center of a county could increase its territory by taking in, by petition, parts of the same county in which the school is located, and another school, located near the county line, could also increase its territory by taking in, by petition, parts of other counties than the one in which the school was located, provided only, that those parts of other counties must lie adjoining the municipality.

But counsel contend that section 4533, Code 1906, has been repealed by the passage of chapter 101, Laws 1908. The title of the act referred to is in the following language: "An act to authorize the municipal authorities of municipalities in this state, constituting separate school districts, to issue bonds for such districts to build and repair school buildings, to maintain schools therein, pay the expenses thereof, and levy taxes on such districts with which to pay for the same."

There is not a word in this title which refers directly to section 4533, Code 1906; that section is not mentioned in it, and there is not a word in the title of the act which refers to anything dealt with in section 4533. They say that this act repeals section 4533 because in the body of the act of 1908, section 2, there appears this language: "That the taxable property of such added territory to such municipality shall be assessed and the tax collected in the same manner as on the property within the corporate limits." Can a statute be repealed in this way?

This court in 104 Miss. 752, in passing upon the question of repeal of statutes by implication says, on page 761: "In construing statutes, we must look to the intention of the legislature, the spirit of the law, and the policy and purpose of the same. In reference to the history and passage of a law it has been decided that, in construing a statute, the entire legislation on the same subject, its policy and reason as well as the text of the particular act, must be looked to. (Citing 75 Miss. 275). Statutes relating to the same subject are to be construed together if possible, and a harmonious interpretation should be adopted. All statutes relating to the same subject must be taken as one system, and construed consistently, if this can be done. (Citing 45 Miss. 294)."

I deny that there is any conflict between the Act of 1908 and section 4533, Code of 1906, growing out of the language contained in section 2 of said act, to wit: "That the taxable property of such added territory to such municipality shall be assessed and the tax collected in the same manner as on the property within the corporate limits." This language merely means that the mayor and board of aldermen shall levy the taxes on the part of the district outside of the municipality in the same manner that they levy the taxes on the part of the district within the municipality; that the tax should be uniform and without partiality; and

that the officers collecting said tax shall do it in the same manner without showing partiality to either those within or without the municipality; that it should be collected from all alike, whether they reside within or without the municipality. There is absolutely no reference in the statute to the particular officer who shall do the collecting.

S. D. Neil and S. E. Turner, for appellee.

Assuming, which does not by any means appear, that the property in the territory added to the Carrollton Separate School District was properly and legally assessed and the taxes for the fiscal year 1914 lawfully levied, is the sheriff and tax collector of Carroll county by law authorized to collect such taxes? If not, he could not of course be required to do so by the mayor and board of aldermen.

Bear in mind that the town of Carrollton was a municipality having over three hundred inhabitants and was, by its mayor and board of aldermen declared to be a separate school district under the provisions of section 4011 of the Code of 1892, and that the territory which was added to the Carrollton Separate School District was, by an order of said Board, passed pursuant to the provisions of section 4013 of said Code.

The statute law relative to the organization of separate school district, and the addition of territory thereto, has been several times changed from what it was both in the Code of 1892 and the Code of 1906.

The statutes applicable to the foregoing facts are the following: Chapter 193 the Laws of 1914, page 262; by this chapter, it will be observed that there are three kinds of separate school districts that may be organized. First, a municipality by an ordinance of the mayor and board of aldermen therefore may be declared to be a separate school district; Second, any unincorporated district with an assessed taxable valua-

tion of not less than two hundred thousand dollars, by the county school board, may be declared to be a separate school district; and Third, any unincorporated district of not less than sixteen square miles, by the county school board may be declared to be a separate school district.

By chapter 192 of the Laws of 1914, page 262, it is in substance provided as follows: "For separate school districts having no municipal organization, the board of supervisors on petition of a majority of the qualified electors of the separate school district, shall levy the required tax . . . And the county tax collector shall collect the same each year and deposit with the county treasurer to the credit of the district for which it was levied," etc.

By this chapter, the taxes for the maintenance of the schools in the separate school districts, referred to in paragraphs two and three above, are levied by the board of supervisors and collected by the sheriff and tax collector of the county.

By chapter 118 of the Laws of 1914, page 97, it is provided in substance as follows: "The municipal assessment of all property subject to taxation, except such as is required by law to be assessed by the state railroad assessors, shall be made by the clerk or tax collector by copying from the county assessment rolls that portion thereof which embraces property or persons within the corporate limits, the copy to be made at any time after the assessment rolls are approved, and all changes in the county assessment thereafter made shall likewise be made in the copy, said copy to be placed in the hands of the municipal tax collector and be his warrant for the collection of municipal taxes."

The above quotation from this chapter, of course, relates to the method of assessing and collecting taxes for separate school district purposes where the only territory is that embraced within the corporate limits

of the municipality. As to the assessment of the property and the collection of taxes thereon in a separate school district embracing not only the territory within the corporate limits of a municipality, but, in addition thereto adjacent rural territory which has been added to such separate school district the following provision of said chapter is applicable:

"And where any municipality, together with separate adjacent, annexed territory constitutes a separate school district the assessment of all taxable property and persons in such separate adjacent, annexed territory, for separate school district purposes, except such property as is required by law to be assessed by the state railroad assessors, shall be made by the clerk or tax collector, by copying from the county assessment roll, that portion thereof which embraces property or persons within the limits of such separate, adjacent, annexed territory, which copy shall be made in the same way and in the same manner as the copy is above required to be made of the property and persons inside of the corporate limits of such city" etc. See Laws 1914, page 98, beginning with the word, "and" in the sixth line. It will be noted also that in the statute following the words, "annexed territory," there is a semicolon, but this is only an error in punctuation as a comma should follow the word "territory," and in making our quotation we have used a comma rather than a semicolon.

By reading this chapter carefully, you will observe that the assessment of property in a separate school district is provided for in the following instances: First, for the assessment of property situate within corporate limits of a municipality when only the municipality constitutes a separate school district; Second, for the assessment of property in such a district that has escaped taxation of former years; Third, for the assessment of property in a separate school district which includes not only the territory embraced within

the corporate limits of a municipality, but in addition thereto, adjacent, annexed rural territory; Fourth, for the collection of taxes on property in such a district as has escaped taxation for former years.

In each instance, the assessment so to be made is made by the clerk or tax collector of the municipality copying such property or persons from the assessment rolls of the county.

You will then find, beginning at the fourth line from the bottom at page 98, that this chapter provides as follows: "And all such copies, above provided to be made, shall be placed in the hands of the municipal tax collector and be his warrant for the collection of municipal and separate school district taxes."

This chapter, that is to say, chapter 118, above referred to, is the last legislative enactment on this subject and a careful reading of this chapter will convince you not only that the property lying within the corporate limits of a municipality which constitutes a separate school district, but, in addition thereto, property lying within the limits of adjacent annexed territory to such separate school district, is required to be made by the clerk or tax collector, copying from the county assessment roll that portion thereof which embraces property or persons within the limits of the municipality in one instance and of the municipality and added territory in the other, and that, in every instance, all of the copies so provided for shall be placed in the hands of the municipal tax collector and be his warrant for the collection of separate school district taxes.

Since the adoption of the Code of 1906, the legislature adopted chapter 101, page 91, of the Laws of 1908. By reference to section one of this chapter, you will find that any municipality constituting a separate school district, whether such district is composed alone of the corporate limits of such municipality or made up by such corporate limits and added territory in the manner prescribed by law, is authorized and empowered

to sell the bonds of the district for the purpose of erecting, repairing and maintaining school buildings in such district, and maintaining schools therein, and paying the expenses thereof, including the salary of teachers, fuel and other necessary expenses, and for the purpose of paying the principal and interest of such bonds the said municipality is authorized and empowered annually to levy a tax on all the taxable property in the added territory, to make up said district. In addition to the issuance of bonds for that purpose and the levy of taxes for the purpose of paying the principal and interest of such bonds, it is further provided that the taxable property of such district, including such added territory, shall also be liable to taxation by said municipality for the purpose of paying the necessary expenses of such schools, including salaries, fuel and all other expenses incident thereto, to run said schools after the expiration of four months provided for by the state or to supplement, during the four months, the funds distributed by the state.

By reference to section two of this chapter, you will also find that it is provided: "That the taxable property of such added territory to such municipality shall be assessed and the taxes collected in the same manner as on the property within the corporate limits."

While there is no express reference to sections 4533 and 4534 of the Code of 1906, it is clear that this section 4534 is concerned, it is immaterial whether that section was amended by the Act of 1908 or not, inasmuch as that section has been subsequently amended by chapter 246 of the Laws of 1912. Furthermore, that section has no bearing on the questions here involved.

As to section 4533 however, it is provided that "the school taxes in such added territory shall be collected by the county tax collector and deposited with the municipal treasurer of the district."

By reference to section two, chapter 101 of the Laws of 1908, it is provided: "That the taxable property

of such added territory to such municipality shall be assessed and the taxes collected in the same manner as on the property within the corporate limits."

There can, of course, be no doubt but that the property within the corporate limits was required to be collected by the tax collector of the municipality. Section 4533 says that the taxes in the added territory shall be collected by the county tax collector, whereas the Act of 1908 says that the taxes in such added territory shall be collected in the same manner as on the property within the corporate limits, that is to say, by the municipal tax collector. These two provisions, that is to say, the provisions of section 4533 and the Act of 1908, are in direct conflict, and of course both cannot stand. Under the Code, the taxes are to be collected by the tax collector of the county; under the Act of 1908 by the municipal tax collector. As the act of 1908 is the last expression of the legislature, it, of course, follows that provision referred to in section 4533 of the Code is repealed.

But, as stated, even the Act of 1908 is not the latest legislative enactment on this subject. To the contrary, the latest legislative enactment on this subject is chapter 118 of the Laws of 1914, to which we have referred and from which we have quoted liberally.

We have referred to chapter 101 of the Act of 1908 for the reason that if the court should be of the opinion that we are in error as to our construction of chapter 118 of the Laws of 1914, it is still clear that the tax on property in the added territory is not to be collected by the county tax collector, as provided by section 4533 of the Code of 1906, but by the city tax collector as provided by section f, chapter 101 of the Laws of 1908.

The fact is, however, under the law as it is now written and under the law as it was, prior to the levy of the taxes in controversy, all of the property within the corporate limits of the town of Carrollton, as well

as all of the property within the limits of the added territory, all of which comprises the Carrollton Separate School District, was assessed by the clerk or tax collector of the town of Carrollton, copying from the county assessment roll all of such property and persons appearing on said roll within that territory, and this assessment so made was to be delivered to the city tax collector and be his warrant for the collection of such taxes, this is what chapter 118 of the Laws of 1914 provides.

In order that our position may be perfectly clear, we may reiterate that the appellant relies entirely upon that provision of section 4533 of the Code of 1906 to the effect that: "The school taxes in such added territory shall be collected by the county tax collector and deposited with the municipal treasurer of the district." This provision, we contend, has been repealed by section two of chapter 101 of the Laws of 1908, and also by chapter 118 of the Laws of 1914, in both of which said chapters the taxes are required to be collected not by the sheriff, but by the city tax collector.

S. E. Turner and Monroe McClurg, for appellee.

This honorable court will, we think, quickly observe from the statement of the salient facts in the case, that the orders of the board amounted to a futile effort to exercise a power which it did not possess; that the final order of September 15, 1915, to proceed by distress, was in the nature of a mandamus to the tax collector to perform a mere imaginary duty and that his "objections" were in legal effect a general demurrer to that order, or demand upon him; and too, that each ground assigned by him constituted a complete defense. And also, that a sixth ground of complete defense arose by operation of law, in that, the sheriff and tax collector's term of office had expired

before the cause was heard in the circuit court and that court, bound to take judicial notice of that fact, had no power to enforce that particular order even if it had been lawfully made. The court, however, preferred to decide the case as presented and sustained the "objections" or "demurrer," and dismissed the case as being wholly groundless. But, all of the foregoing propositions are carefully, accurately, and conclusively argued by our associate counsel, Neill & Clark.

SMITH, C. J., delivered the opinion of the court.

"Where any municipality together with separate adjacent annexed territory, constitutes a separate school district," under the provisions of chapter 118, Laws 1914, it is the duty of the municipal tax collector, and not of the sheriff, to collect the separate school district taxes levied upon property situated in such "separate adjacent annexed territory."

Affirmed.

BOWMAN v. STATE.

[73 South. 787, Division B.]

LARCENY. Evidence. Sufficiency.

Under the facts in this case the court held that the evidence was not sufficient to show beyond all reasonable doubt the guilt of the defendant of the larceny charged.

APPEAL from the circuit court of Lafayette county.

HON. J. L. BATES, Judge.

Jim Bowman was convicted of larceny and appeals.

Appellant was convicted of the crime of larceny, sentenced to a term of two years in the state penitentiary, and appeals. He was indicted by the circuit

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Statement of the case.

court of Lafayette county for the larceny of a "certain red and white spotted horned steer being then and there the personal property of J. P. Young, and of the value of forty-five dollars. " In attempting to make proof, the state introduced Mr. Young, the owner of the lost animal, and one Mr. Terrell. The testimony of Mr. Young tends to prove that he owned a red and white ox, between three and four years old; that he had broken the ox to work some time in the spring, and soon thereafter, in May, 1915, he put the animal in his pasture about one and one-half miles from his home and about six miles from Water Valley. Sometime about the middle of August, Mr. Young went to the pasture for this young ox, for the purpose of doing some work, and missed the animal. He immediately began to make inquiries, and, according to his own statement, rode over two counties in search of the missing ox. He finally got some clue or information that some days prior to the time of his inquiry, and about the time he went to the pasture in search of the animal, an ox's tracks had been seen on the Water Valley and Oxford road, going west; and on this information Mr. Young states that he went to Water Valley and inquired of Mr. Terrell, the state witness, who advised him that Jim Bowman, the appellant, had butchered an animal answering the description. Mr. Young then called on appellant, a negro living in the town of Water Valley and operating a negro restaurant there, and asked appellant if he had at any time that season butchered an ox. It is the testimony of Mr. Young that appellant denied butchering an ox. Appellant explained that he did not regard the animal he did butcher, as hereinafter shown, as an ox, but as a "yearling."

The prosecutor swore out an affidavit, against the defendant and had him arrested on a charge of larceny of the animal. Mr. Young further testifies that he went with a negro who helped butcher an animal for

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appellant in August, and dug up the head which the negro servant pointed out as the head of a steer butchered by the defendant; that when they dug up the head it was found that the horns had been removed in the process of butchering, and the horns could not be found. Mr. Young was unable to identify the head as the head of the ox he was searching for. No evidence of any mark or brand by which the head could be identified was introduced. The testimony, as a whole, shows that appellant did butcher a red and white spotted steer one day in August, 1915, and did so under the following circumstances: Appellant one Saturday morning advised Mr. Terrell, who was a white man living out in the country from Water Valley, and who had at times before that sold some pork to Jim Bowman for use in and about his restaurant, that he (Bowman) had a good "beef" tied up in his barn, and inquired if Terrell could use one-half of it when it was slaughtered. Terrell responded that he would drive over and look at the animal, and did so in company with another white man. Terrell represented that he would take one-half of the meat when and if butchered by a man who knew his business. The parties then agreed upon a Mr. Jack Conway, a white man, to do the butchering. Conway, assisted by a negro helper, then butchered the animal and divided the meat between appellant and Terrell; and the negro helper, it seems, as a matter of sanitation, and not for any purpose of concealment, buried the head. By an understanding had between appellant and Terrell the latter took charge of the hide, and sold it for \$5, and reported the proceeds to appellant. Appellant claimed to have purchased the animal so butchered from a negro by the name of Andrew Davis, who lived some fifteen miles east of Water Valley in Calhoun county. On the trial of the case Andrew Davis was introduced as a witness in behalf of appellant, and corroborated the statement of appellant that he

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(Davis) sold appellant a young red and white spotted yearling that dressed three hundred and thirty pounds when butchered. Andrew Davis claims that he had this animal "in a pasture at Bill Steen's, where he bought it;" that he carried it to Water Valley one Friday night and sold it in settlement of a debt of five dollars, which he had borrowed before that time, and for a further cash consideration, amounting, in all, to about twenty-two dollars. It seems that Andrew Davis was also indicted for the larceny of the same animal. Mr. Young at one place in his testimony states that his ox was not "spotted," but was a red and white animal, the white predominating. There is no evidence tending to show that appellant or any one else actually took Mr. Young's ox from the pasture, or that appellant was in possession of any kind of an animal, except as indicated.

Appellant relies upon two propositions: First, that no crime whatever is shown; and, second, that, if any crime whatever is shown, no venue is proven. Complaint is also made of one instruction given the state.

Falkner, Russell & Falkner, for appellant.

Ross A. Collins, Attorney-General for the state.

STEPHENS, J., delivered the opinion of the court.

In our opinion the facts do not show beyond a reasonable doubt that the defendant is guilty of the crime charged. We have carefully read the entire record, and our judgment is based on all the testimony in the case. The proof does not show that appellant was seen anywhere about the pasture of Mr. Young, or that he carried to Water Valley any animal whatever. Appellant lives in the town of Water Valley, and operates there a negro restaurant, and, on account of

the business he is engaged in, occasionally buys fresh meat. The fact that he operates a restaurant might have added to the suspicion that he was guilty. As a matter of fact, the conviction is based more on suspicion than positive proof. The conduct of appellant in arranging with Mr. Terrell to take one-half of the dressed meat, the manner in which he had the animal butchered, and the way in which he disposed of the hide are all consistent with good faith. There was no concealment, and no effort to conceal anything. Responsible white men handled the transaction. The best way to identify the animal would be by means of its hide. This positive and continuing evidence of identification was not destroyed by appellant; but, on the contrary, the hide was turned over to Mr. Terrell, the state witness, to be offered on the market and disposed of to the best advantage there at Water Valley. There is no positive evidence that the animal slaughtered at the instance of appellant is the identical animal lost by Mr. Young. It may have been the same animal, but the proof does not establish this fact beyond a reasonable doubt. It is possible that the ox which Mr. Young lost strayed from his pasture through no criminal agency whatever, and just what did become of the animal is largely a matter of speculation.

Under this view of the facts, we need not comment upon the alleged failure to prove venue, or upon the instruction complained of.

Reversed and remanded.

EDWARDS v. YAZOO & M. V. R. Co.

[73 South. 789, Division B.]

1. JUDGMENT. *Nunc pro tunc*. Power to enter. *Conflicting with former judgment*.

When the court under Code 1906, section 802, so providing, after announcing his intention to give a peremptory instruction for the defendant, allowed plaintiff to take a voluntary nonsuit, and such judgment was duly entered, the court could not at a subsequent term render a judgment *nunc pro tunc*, in direct conflict with the one first entered, when no clerical error was shown.

2. SAME.

Under Code 1906, section 802, so providing it was proper for the court to allow the plaintiff to take a voluntary nonsuit, where done before the jury retired, even though the court had previously announced its intention to grant a peremptory instruction for the defendant.

3. TRIAL. *Peremptory instruction*. *Consideration by the jury*.

While it is not necessary for the jury to actually retire to consider a peremptory instruction, still before the law is actually given in charge to the jury the whole law of the case is within the breast of the trial judge and under his control.

APPEAL from the circuit court of Quitman county.

HON. T. B. WATKINS, Judge.

Consolidated action by Mrs. B. F. Edwards against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals.

The two cases above styled involve the same cause of action, and were argued and submitted together. In each case Mrs. Edwards, the appellant, was plaintiff in the court below, and we shall refer to the suits as the first suit and the second suit regardless of their numbers on the docket. In the first action the plaintiff, as the mother, sued appellee for the death of her son, Asa B. Edwards, who was run over by one of the freight trains of appellee June 9, 1912, a short distance north of Lula in Tunica county. In the first suit issue was joined and a trial had; but after both sides had concluded the taking of testimony, a nonsuit was

granted the plaintiff, under the conditions hereinafter stated. After the testimony was in, appellee, as defendant, asked for a peremptory instruction. This instruction by agreement was argued before the trial judge in the office of Mack & Donalson, attorneys for the plaintiff, and in one of the rooms of the courthouse where the case was being tried. The argument was had about noon, and after it was concluded the trial judge announced his intention to give the instruction, and wrote upon the written instruction with a pencil the word "Given." It was then taken by one of the attorneys for the defendant and handed to the clerk, and was by the clerk marked "Given and filed." When the court reconvened after the noon hour, and while the jury was still out in the jury room, the court made some statement to counsel for plaintiff about submitting the case to the jury, and thereupon counsel for plaintiff asked leave of the court to take a nonsuit. At the time this motion for a nonsuit was made the jury was not in the box, and of course had not retired to consider their verdict. The trial judge had just ascended the bench on reconvening the court, and the application for a nonsuit was the first matter presented to the court after the court had reconvened. Counsel for the defendant resisted the motion for a nonsuit, but after a discussion thereof, the court sustained the motion and gave the following judgment which was duly entered upon the minutes of the court:

"This day this cause came on to be heard, all parties being present, when came a jury of good and lawful men, and after the introduction of all the testimony and argument of counsel, and after the instructions of the court had been given, but before the jury had retired, the plaintiff in open court, took a voluntary nonsuit. Be it therefore ordered and adjudged that this cause be dismissed without prejudice; and that plaintiff pay all costs in this behalf expended. June 26, 1913."

This was the only judgment entered in the first suit at the June, 1913, term. At the December, 1914, term the attorneys for the defendant asked the court for what they termed a judgment *nunc pro tunc* in favor of the defendant, and based upon the peremptory instruction which they alleged was given by the court at the June, 1913, term. At the time this motion was made there had been a change in the personnel of the bench, and the trial judge then sitting heard and sustained the motion, and accordingly the following judgment was entered in said cause, to wit:

"This cause came on this day to be heard by the court upon the motion of the defendant, filed herein, to now enter herein a judgment of this court for the defendant upon the peremptory instruction given by this court to the jury at the June term of this court, 1913, to return a verdict for the defendant, and that said judgment be now entered for the defendant, and that said judgment be now entered for then, the said June term, 1913, of this court. And the court, having fully heard and considered said motion and the argument of counsel both for the plaintiff and the defendant thereon, and being fully advised in the premises, doth order that said motion be and the same is hereby sustained; and it appearing to the court from the record in this case at that the June term, 1913, of this court this cause came on for trial upon the issues joined herein, and both parties appearing by attorneys and announcing ready for trial, and thereupon came a jury of good and lawful men, citizens of Quitman county, Miss., to wit, Elias Hardin and eleven others, who after being first duly elected, impaneled and sworn, and who after having heard all of the evidence introduced by either party and having received a peremptory instruction of the court to find their verdict for the defendant; returned into open court the following verdict: 'We the jury find for the defendant'—it is therefore now ordered and adjudged

Statement of the case.

[112 Miss.]

by the court that the plaintiff take nothing by this her suit, and that the defendant is not liable on account of the wrongs and injuries complained of by said plaintiff in her declaration, and is not guilty of said wrongs and injuries, and that said defendant do go hence without cost, and that plaintiff pay all cost of this cause and for which let execution issue. It is further ordered by the court that the above and foregoing judgment be now entered by the clerk of this court on the minutes of this court as of and for the 24th day of June, 1913, the same being one of the regular June term, 1913, of this court, and on which day the peremptory instruction to the jury above mentioned was given, and which date this judgment should have been entered, and that it be now entered for then as a part of the record in this case."

From the rendition of this judgment *nunc pro tunc* plaintiff appeals.

After the first suit was dismissed without prejudice, and on August 12, 1913, appellant, as plaintiff, filed the second suit on the same cause of action. There was a plea of *res adjudicata* filed by the defendant to this second declaration. A demurrer was interposed by the plaintiff to the plea, and the demurrer was by the court sustained. Thereupon the defendant filed the general issue with notice of special matter thereunder, but after counsel for appellee had succeeded in obtaining the so-called judgment *nunc pro tunc* at the December, 1914, term in the first action, they then asked leave of the court to withdraw the general issue plea in the second action, and again filed a plea of *res adjudicata*, in which they set up and pleaded the second judgment of the court rendered in the first suit as a bar to the second suit. The plaintiff filed a replication to the defendant's plea of *res adjudicata*, to which the defendant demurred, and the court thereupon sustained the demurrer of the defendant to the replication of the plaintiff, and, the plain-

tiff in open court declining to plead further, judgment final was entered in favor of the defendant, sustaining the defendant's plea of *res adjudicata* and taxing plaintiff with the costs. From this judgment so entered in the second suit appellant appeals.

Mack & Donaldson and *P. H. Lowery*, for appellant.

Montgomery & St. John Waddell, for appellee.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). The judgment rendered by the trial court in each of the two suits here argued and submitted together must be reversed. The first action filed by appellant was by a solemn judgment of the court dismissed without prejudice, and the court, after the rendition of this judgment, adjourned for the term. The judgment designated by counsel as a judgment *nunc pro tunc* was entered at a subsequent term, and shows upon its face that it is not in fact the rendition of the judgment which the court had, by inadvertence or otherwise, failed to enter, but is the substitution of a judgment in direct conflict with that previously entered. The court by the second judgment undertakes to reverse the ruling of the trial judge who granted the plaintiff a nonsuit and who entered upon the minutes of the court a judgment of nonsuit in due form. The court was not confronted with a situation where no judgment at all had been entered, or even a situation where there was a clerical error or mistake appearing upon the face of the record. The circuit court in entering this judgment *nunc pro tunc* undertakes to review and pass upon the propriety of its former rulings made and entered at a previous term, and in reference to a case over which it no longer had jurisdiction. We are constrained to hold, therefore, that the second judgment entered in the first suit does not possess the es-

sential characteristics of a judgment *nunc pro tunc*, and was and is a nullity. The court had no jurisdiction to render such judgment. The judgment first entered must speak for itself, and it shows conclusively that the plaintiff was granted a nonsuit, and the fact that the court did grant a nonsuit is not disputed by counsel for appellee. The record shows that counsel for the defendant strenuously objected to the entry of this judgment of nonsuit and that the judgment was entered against their protest. There is accordingly no mistake about the intention of the court to grant such judgment.

More than this, we see no impropriety or error on the part of the trial judge in allowing the plaintiff to take a nonsuit under the circumstances disclosed by the record. It is admitted by counsel that the application for a judgment *nunc pro tunc* was based upon the decision of this court in *Schaffer v. Deemer Mfg. Co.*, 108 Miss. 257, 66 So. 736, which was not before the trial court when the first judgment was entered. The question presented for decision in that case was whether or not the trial judge erred in declining to allow the plaintiff to take a nonsuit after he had granted a peremptory instruction in favor of the defendant. The decision of the one and only point at issue in that case was correct. We do not construe the decision as holding that the circuit judge, after announcing his intention to grant a peremptory instruction for the defendant, or even after marking the written instruction, "Given," could not change his opinion or ruling and withdraw the instruction or grant the plaintiff a nonsuit, provided always this is done "before the jury retire to consider of its verdict" in accordance with the express provisions of section 802 of our present Code. The court did decide in the *Schaffer Case*, and correctly so, that it is not necessary for the jury actually to retire to the jury room to consider a peremptory instruction. Certain it is, however,

that before the law is given in charge to the jury, the whole law of the case is within the breast of the trial judge and under his control. It was never the purpose of the law to take snap judgment against a litigant, and for this cause section 802 expressly recognizes the right of every plaintiff to suffer a nonsuit before the jury retire to consider of its verdict. This was expressly recognized by this court in *G. & S. I. R. R. Co. v. Williams*, 109 Miss. 429, 69 So. 215. We tried to make this point clear on the suggestion of error in that case. The court, therefore, did not err in granting the judgment of nonsuit reflected by the record in the first case now before us.

What we have said disposes of the contentions in the second action. It necessarily follows that the second suit was an action properly brought and pending, and should have proceeded to a trial upon the merits. The sustaining of appellee's plea or *res adjudicata* constitutes error for which this cause also must be reversed. Appellant in appealing the first suit challenges the court's ruling in granting the peremptory instruction, and counsel for both sides have argued the facts and merits of the case. Our views on the law questions presented render it unnecessary to comment upon the facts.

The judgment in the suit first prosecuted, being here No. 18705, will be reversed, and judgment entered here in favor of appellant upholding the judgment of nonsuit. The judgment in cause No. 18703 will be reversed and remanded for trial upon the merits.

Reversed and remanded.

SCOTT COUNTY MILLING CO. ET AL. v. POWERS.

[73 South. 792, Division A.]

1. **BANKRUPTCY.** *Preferences. Recovery.*

Payments made by an insolvent debtor are not recoverable as preferences, unless, at the time they were made the creditor to whom such payments were made had actual knowledge or constructive notice of the insolvency of the debtor.

2. **PREFERENCES.** *Recovery. Knowledge of agents.*

The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal, the rule fails when the circumstances are such as to raise a clear presumption that the agent will not perform this duty, and accordingly where the agent is engaged in a transaction, in which he is interested adversely to his principal, or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Suit by Neely Powers trustee, against the Scott County Milling Company and others. From a judgment for plaintiff, defendant appeals.

The Harding-Coor Company was incorporated, with domicile at Jackson, Miss., with the capital stock of ten thousand dollars. Coor, who was the manager of the business, which was that of a wholesale grocery, agreed to take four thousand five hundred dollars of stock and to pay for same in flour. Coor was the local agent of the appellant Scott County Milling Company, and advised the other stockholders that he could arrange to get flour from his principal and turn it over to the Harding-Coor Company in payment on his stock. Coor also advised one Rector, who was a district agent of the milling company with headquarters at Vicksburg, Miss., of this arrangement. Coor afterwards ordered considerable flour from the Milling

Company, to whom he had given a bond for the sum of four thousand five hundred dollars, with the American Surety Company as surety thereon, and thereafter, at various times, about eight thousand dollars worth of flour was shipped to Coor on open account, but at no time did the amount due the Milling Company exceed the amount of the bond given by Coor. The flour thus ordered by Coor was turned over to the Harding-Coor Company, of which he was manager, and by them sold in their regular trade, and the checks of the Harding-Coor Company were forwarded to the milling company in payment of the flour. The milling company knew nothing of the arrangement which Coor had made with the Harding-Coor Company to pay for the capital stock subscribed by him in flour. Coor never paid any money to the Harding-Coor Company on his capital stock, and after a few months of existence the Harding-Coor Company went into bankruptcy, and Coor departed for parts unknown, leaving the company badly involved. Neely Powers was appointed trustee in bankruptcy, and filed his bill in the chancery court, seeking to hold the milling company as a party to Coor's fraud, and seeking the recovery of the money it had received for this flour. The American Surety Company was also joined as a party defendant. Williams & Co. brokers of Vicksburg, Miss., were also joined as parties for the purpose of attaching property of the milling company, which was a Missouri corporation. It is claimed that the payments made by Coor to the milling company for the flour shipped to him and turned over to the Harding-Coor Company were voidable preferences, having been made within four months of bankruptcy. The milling company denies any knowledge of the fraud perpetuated by Coor on the Harding-Coor Company. The court held its decree that the amount paid to the milling company during the period of four months preceding bankruptcy were preferences

and voidable, and entered a decree for an amount sufficient to cover these items.

Alexander & Alexander, for appellant, Milling Co.

Clayton D. Potter and *Geo. Butler*, for appellant, American Surety Co.

Fowers, Brown, Chambers & Cooper, for appellee.

No brief of counsel on either side found in the record.

SMITH, C. J., delivered the opinion of the court.

The only error committed by the court below, in so far as the result reached is concerned, was in holding certain payments made the Scott County Milling Company to be recoverable preferences under the bankrupt law. These payments cannot be recoverable as preferences unless, at the time they were made, the Scott County Milling Company had actual knowledge or constructive notice of the insolvency of the Harding-Coor Company, conceding that this company was then insolvent. Actual knowledge on the part of the milling company is not claimed by counsel for appellee, and any knowledge that its agent, Coor, may have had in this connection cannot be imputed to the milling company; for the reason that in all the dealings between it and the Harding-Coor Company the interests of Coor, because of the fact that he was a stockholder and the business manager of the Harding-Coor Company, were adverse to the milling company, he being engaged, in fact, in a scheme to defraud either it or the Harding-Coor Company, or both.

“The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal, the

rule fails when the circumstances are such as to raise a clear presumption that the agent will not perform this duty, and accordingly, where the agent is engaged in a transaction in which he is interested adversely to his principal, or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein." 31 Cyc. 1595.

Reversed, and bill dismissed.

SNOWDEN ET AL. v. COLLINS.

[73 South. 793, Division A.]

REPLEVIN. *Peremptory instruction.*

Where a trustee under a deed of trust to secure the purchase price of cattle brought an action of replevin for the cattle covered by the trust deed and there was a conflict in the evidence as to whether the debt secured by the trust deed had been paid, the court should not have given a peremptory instruction for the plaintiff.

APPEAL from the circuit court of Lauderdale county.

HON. W. W. VENABLE, Judge.

Replevin by W. F. Cotton trustee, against E. L. Snowden and others. From a judgment for plaintiff, defendant appeals.

Appellants executed a deed of trust to appellee as trustee covering the purchase price of certain cattle purchased by them, which deed of trust secured a number of notes. Several payments were made on the notes, and some of the notes were surrendered. Appellants claimed that they had made payments sufficient in the aggregate to liquidate the entire indebtedness secured by the deed of trust. Suit was brought in re-

plevin for the immediate possession of certain of the cattle. On the trial in the circuit court upon the issue of whether or not the debt had been paid, the evidence was conflicting. The court gave a peremptory instruction for the plaintiff (appellee here) and the defendants appealed.

F. V. Braham, for appellants.

SMITH, C. J., delivered the opinion of the court.

The peremptory instruction should not have been given.

Reversed and remanded.

SMITH v. STATE.

[73 South. 793, Division B.]

1. ABORTION. *Attempts. Indictment. Sufficiency.*

Under Code 1906, section 1235, making it manslaughter to administer or use medical or other means with intent thereby to destroy an unborn child and thereby destroy such child, unless the same shall have been advised by a physician to be necessary etc., and section 1049, providing that every person who shall attempt to commit an offense and shall do any overt act towards the commission thereof, but shall fail, etc., on conviction shall be punished etc. An indictment which charges that defendant did willfully, unlawfully, feloniously design and endeavor to kill, abort, and destroy one unborn quick child, then and there in the womb of a woman then and there pregnant, by willfully, unlawfully and feloniously administering to and inserting in the womb of the said woman certain foreign substances etc., with the felonious intent then and there the said unborn quick child, in the womb of said woman as aforesaid, willfully, unlawfully and feloniously to kill, abort and destroy, contrary to the form of the statute etc., sufficiently charges the crime of an attempt to commit an abortion.

2. INDICTMENT AND INFORMATION. *Negating exceptions. Necessity.*

The exception in section 1235, Code 1906, defining abortion "unless the same shall have been advised by a physician" etc., need not be negated as it is an affirmative defense, which if relied

upon must be shown by the defendant or appear affirmatively in the evidence.

3. **INDICTMENT AND INFORMATION.** *Negating exceptions. Sufficiency.*
An indictment for abortion which avers that it was unlawfully and feloniously done, negatives its lawfulness.
4. **ABORTION.** *Criminal prosecution. Instruction.*

In a prosecution under Code 1906, section 1234, for attempting to commit an abortion, an instruction that, if the jury believe beyond a reasonable doubt from the evidence that accused willfully, unlawfully, and feloniously inserted in the uterus or womb, of a woman a rubber catheter and gauze with the intention and purpose of causing an abortion or destroying an unborn quick child, then in said womb, he is guilty as charged in the indictment, and the court further charges the jury that this is true even though you may believe from the evidence that the woman was an unmarried woman, and that said unborn child was an illegitimate one, was a proper instruction.

5. **WITNESSES.** *Criminal prosecution. Character of evidence. Cross examination.*

Where in a prosecution for attempting to commit an abortion the defendant introduced witness to prove his character as to the trait charged, it was not error to permit the witness on cross-examination to state that they had heard charges of this kind against defendant before, but that they knew personally nothing of these matters, since the defendant having put his character as to this charge in evidence, it was permissible for the state to cross examine the witness in this way.

6. **CRIMINAL LAW.** *Trial. Comments of district attorney.*

In a prosecution for attempting to commit an abortion it was reversible error for the prosecuting attorney to comment to the jury on the failure of the defendant to introduce his wife as a witness.

APPEAL from the circuit court of Amite county.

HON. R. E. JACKSON, Judge.

F. C. Smith was convicted of attempting to commit an abortion and appeals.

The facts are fully stated in the opinion of the court.

R. S. Stewart, for appellant.

The indictment undertakes to charge an attempt to cause an abortion presumably under section 1049,

Code 1906, as this is the only statute under the Mississippi Laws, relating to the crime of attempt.

A demurrer to this indictment was interposed, raising among other points the following: (a) There is no such crime as an attempt to cause an abortion by the doing of the things set out in the indictment; (b) if there is such a crime, then the indictment does not charge it. The demurrer was by the court overruled, and this is assigned as one of the errors committed upon the trial of this cause.

Is there such a crime known to the law as an attempt to cause an abortion, which if completed only amounts to manslaughter? There are statutes of several states specially providing that the administration of drugs, the use of instruments or any other attempt made to cause an abortion is in and of itself a crime, and is in and of itself punishable by a distinct statutory provision, forbidding such administration of drugs, use of instruments or other means, intending to cause an abortion, but the true rule seems to be that in the absence of any such statute, the offense is not complete and is not punishable, unless and until an abortion or death of the mother is had; in other words, in the absence of a special statute on the subject, the true rule seems to be that any and all acts done in the furtherance of the abortion, short of an actual abortion, constitute no crime. 1 Cyc., pages 173, paragraph "G"; *Commonwealth v. Bangs*, 9 Mass. 387; *State v. Springer*, 3 Ohio, 120.

Under the regular statute defining the crime of manslaughter, and providing punishment therefor, the mere fact that there is lack of or absence of premeditation, reduces the crime from murder to manslaughter and in the case of *Gibson v. State*, 38 Miss. 295, the court practically said that there is no such crime as an attempt to commit manslaughter. In the case *Gibson* was on trial for assault and battery with the intent to kill and murder, and the jury returning its verdict,

said: "We the jury find the defendant not guilty of an assault and battery with intent to kill and murder, but find him guilty of an assault in the attempt to commit manslaughter," and in passing upon the validity of this verdict, the court upheld same, saying: "If the verdict or rather the words 'in attempt to commit manslaughter' were descriptive of an offense known to the law, then the verdict could not stand, . . . and by affirming the case and upholding the verdict, the court held that there is no such crime as 'attempt to commit manslaughter.' "

Had the appellant succeeded in causing an abortion, and had the child been destroyed, then he could have been guilty of nothing more than manslaughter under section 1235, Code 1906; then, is there such a thing as an attempt to cause an abortion; an attempt to commit manslaughter?

We submit further that section 1235, Code 1916, forbids certain acts being done, such as giving drugs, administering medicine, using instruments or other means, if done with the intent of causing an abortion, and if the child is actually destroyed. That is, the crime consists of the use of instruments or medicine with the intent to destroy the child, and the actual destruction of the child? Can there be such a thing as an attempt to use medicine, drug or instrument, or other means, and the actually using of such in the furtherance of the intention, to cause an abortion? We submit that there is no crime unless an abortion is caused or the child is destroyed or the mother killed in the endeavor to cause the abortion.

But if wrong in this, we insist that the indictment under section 1049, Code 1906, is defective and the demurrer should have been sustained, and this leads to a discussion of the second ground insisted on in the demurrer. (b) Is the indictment, as drawn, good on the charge of attempt to commit a crime?

The indictment undertakes to charge a statutory offense, purely, as there is no such thing known to the common law as an attempt to commit crime, and being a purely statutory offense, we submit that the precise language should be used in indictment as is used in the statute.

It will be noted first, that nowhere does the indictment negative the idea that the abortion sought to be caused, was not advised by a physician or that it was necessary to save the mother's life, and second the indictment does not charge that the attempt failed, or that the appellant was prevented from committing the crime.

We submit that there can be no such thing charged as an attempt to commit a crime, unless the indictment sets forth not only the facts constituting the attempt, but in addition, it must charge a failure of the attempt or that the accused was prevented from consummating the act.

As said *supra*, this being a statutory charge, the indictment must include and set forth every word, and the precise words used by the statute in defining the crime. *Anthony v. State*, 13 S. & M. 263; *Ike v. State*, 23 Miss. 525; *Scott v. State*, 31 Miss. 473; *Williams v. State*, 42 Miss. 328; *Lewis v. State*, 49 Miss. 354; *Dee v. State*, 68 Miss. 601, 9 So. 356.

Certainly, the indictment does not follow the statute, it does not charge that the attempt failed, does not charge an attempt at all, but charges certain parts or constituent parts of the offense, that of using means with the intent or purpose of causing an abortion, and here it stops, and is silent as to whether an abortion was caused, or whether there was a failure to cause the abortion, or whether or not there was a prevention of the consummation of the crime, and we submit that the indictment does not, under section 1049, Code 1906, charge an offense against the penal laws of the state with that certainty and clearness that the law requires,

and we submit further that the demurrer to the indictment should have been sustained and the court erred in overruling same.

Ross A. Collins, Attorney-General for the state.

In answer to the first ground of demurrer, viz; that there is no such crime as attempt to commit abortion, I think it is only necessary to refer to section 1235 of the Code of 1906, which provides that any person who shall administer to any pregnant woman, quick with child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, shall be guilty of manslaughter. And section 1049, Code 1906, defines an attempt to commit an offense and fixes the punishment. This indictment was drawn under these sections. Most certainly an "attempt to commit abortion" is provided for by the statute. If any abortion had resulted from the operation, the appellant would have been guilty of manslaughter.

Paragraph "G", 1 Cyc. 173, cited by counsel for appellant in support of his contention that there is no crime unless the actual abortion results from the operation, not only does not support his view but holds directly to the contrary.

It reads as follows: "At common law, as well as under some statutes, an actual abortion must follow the administration of the noxious substance or the use of the instruments, in order to complete the offense; but under statutes prohibiting the administration of any drug or the use of any instrument to "any woman" (or "any pregnant woman") with intent thereby to produce her miscarriage, a resulting miscarriage is not, as has been pointed out, essential. Again it is said in L. C. J. 314:

"So far as the act of causing or procuring an abortion is a crime at common law or by statute, an attempt

to commit such crime also is an indictable offense according to the general principles governing the attempt to commit crime. Under the statute, however, by which the subject is now governed, the crime generally consists merely in an attempt, that is the doing of certain things with the intent to cause abortion. In other words, under such statutes the offense does not consist in the actual procurement of an abortion or an attempt to procure an abortion as distinct crimes, but in administering drugs, using mechanical means, etc., with the intent mentioned, whether or not the intended means are used or taken, or the miscarriage is produced. It is not even necessary that the means used should be calculated to produce a miscarriage, unless the statute so requires."

Again it is argued by counsel for appellant that the indictment as drawn does not charge an attempt to commit abortion, because the exact language of the statute is not used and because the indictment does not negative the idea that the operation was advised by a physician as being necessary, nor charge that the attempt failed or that appellant was prevented from committing the crime.

It has been repeatedly held by this court that it is not necessary to follow the exact language of the statute if words of equivalent meaning are used. *Harrington v. State*, 54 Miss. 490; *Richburger v. State*, 90 Miss. 806; *State v. Presley*, 91 Miss. 377. In the case at bar, however, the exact language of the statute is followed.

But it is insisted by appellant that the indictment is defective because it does not negative the idea that the operation was advised by a physician as being necessary. It is not necessary to aver negatively that the abortion was advised by a physician, this being a matter of affirmative defense. The general rule seems to be that exceptions and provisions in the enacting clause of a statute must be negated, and such as are not in the enacting clause need not be negative, the lat-

ter being matters of defense. 10 Ency. of Pl. & Pr. 495. In the case of *Thompson v. State*, 54 Miss. 740, at page 744 the court says: "It may be said generally, that, when the exception is so engrafted in the enacting clause of the statute that the offense cannot be described without meeting and negating the exception, it must always be set out in the indictment; but that where the exception is contained in some other statute, or is clearly separable, from the offense, and the crime may be described without reference to the exception, then the latter is a matter of defense and need not be mentioned in the indictment." Citing, *Steel v. State*, 1 Barn. & Add. 94; *State v. Abbey*, 29 Vt. 60; 1 Bishop Crim. Proc., sec. 631, et seq.; *United States v. Cook*, 17 Wall. 168.

The exception in section 1235, Code 1906, viz: "Unless the same shall have been advised by a physician to be necessary for such purpose," is not included in the enacting clause, but is a subsequent substantive clause, and practically all the authorities hold that if the exception is not descriptive of the offense, it need not be negated. *Johnson v. People*, 33 Col. 224, 80 Pac. 133; 108 Am. St. Rep. 85, quoting 108 A. S. R. middle page 89.

Substantially the same doctrine was announced in the leading case of *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538, followed by us in *Packer v. People*, 26 Colo. 306, 57 Pac.—.

ETHERIDGE, J., delivered the opinion of the court.

Dr. F. C. Smith, the appellant, was indicted and convicted in the circuit court of Amite county on the charge of attempting to commit an abortion in said county, and it is claimed that the indictment is insufficient to charge any crime under the law of this state, and that there is no such crime as an attempt to commit an abortion, and that the court erred in granting

the instruction for the state on that charge, and also that error was committed in admitting on cross-examination the defendant's witnesses to prove good character, evidence that the witnesses had heard that the defendant had been accused of this offense before, and also that prosecuting attorney, privately employed, committed error in referring to the failure of the defendant's wife to testify. The indictment charges that the appellant did willfully, unlawfully, feloniously design, attempt, and endeavor to kill, abort, and destroy one unborn quick child, then and there in the womb of Mrs. Kiser, a woman then and there pregnant with unborn quick child, by then and there willfully, unlawfully, and feloniously administering to and inserting in the womb of the said Mrs. Kiser certain foreign substances, to wit, linen gauze and a rubber catheter, with the felonious intent then and there the said unborn quick child, in the womb of said Mrs. Clara Kiser as aforesaid, willfully, unlawfully, and feloniously to kill, abort and destroy, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Mississippi. The statutes of the state make it a crime to administer to any woman any medicine, drug, or substance whatever, or use or employ any instruments or other means with intent thereby to destroy such child, and one who shall thereby destroy such child shall be guilty of manslaughter, unless the same shall have been advised by a physician to be necessary, etc. Code of 1906, section 1235. Section 1049 of the Code provides that every person who shall design and attempt to commit an offense and shall do any overt act towards the commission thereof, but shall fail therein, or shall be prevented from committing the same, on conviction thereof shall be punished, etc., providing the different punishments. We think the indictment sufficiently charges the crime under these statutes.

The exception in the statute, "unless the same shall have been advised by a physician, etc.," need not be

negatived as it is an affirmative defense which, if relied upon, must be shown by the defense, or appear affirmatively in the evidence.

The indictment avers it was unlawfully and feloniously done, and that negatives its lawfulness.

The instructions complained of is the only one given for the state, and charges the jury that if they believe beyond a reasonable doubt from the evidence in the case that Dr. Smith willfully, unlawfully, and feloniously inserted in the uterus, or womb, of Mrs. Kiser a rubber catheter and gauze with the intention and purpose of causing an abortion or destroying an unborn quick child then in said womb, he is guilty as charged in the indictment, and the court further instructs the jury that this is true, even though you may believe from the evidence that Mrs. Kiser was an unmarried woman, and that said unborn child was an illegitimate one. If there is any error whatever in this instruction it is cured by instruction No. 1 for the defendant, but we believe the instruction to be free from error.

The defendant introduced witnesses to prove his character as to the trait charged against him in this indictment, and on the cross-examination of these witnesses they were asked and permitted to answer that they had heard charges of this kind against him before, but that they knew personally nothing of these matters. The defendant having put his character as to this charge in evidence, it was permissible for the state to cross-examine the witness in the manner which it did in this case, and there is no error in any of the foregoing assignments.

But the case must be reversed because of the comment made by prosecuting counsel privately employed in this case, in which he said:

"He said he always wanted some lady present when he examined another lady, and that he carried this woman from his house or sent her from his house where his wife was to the hotel where he could have an out-

side witness in Mrs. Leona Anders, whom he called to the room, but would not examine the woman in his wife's presence, and it's strange, gentlemen, that he has not called his wife here as a witness for him."

This court has repeatedly held that the failure of a husband to call his wife as a witness for him in a criminal case is not a proper subject of comment by counsel. *Johnson v. State*, 94 Miss. 91, 47 So. 897; *Scott v. State*, 80 Miss. 197, 31 So. 710; *Cole v. State*, 75 Miss. 142, 21 So. 706; *Johnson v. State*, 63 Miss. 313; *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440.

The case is accordingly reversed and remanded.

Reversed and remanded.

STATE EX REL. HOWIE DIST. ATTY. v. BRANTLEY, STATE
GAME AND FISH COMMISSIONER.
EX PARTE ROBINSON.

[73 South. 795, In banc.]

1. FISH. Game. Statute. Validity. Construction under void statute.

A majority of the supreme court are agreed that chapter 99, Laws 1916, should not be regarded in force and effect in Mississippi, and from this it necessarily follows that there is no such public office now as that of state game and fish commissioner.

2. SAME.

Laws 1916, chapter 99, being void, no conviction thereunder can be sustained.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Two cases, one *quo warranto*, by the state on relation of J. H. Howie, district attorney, against Z. A. Brantley, game and fish commissioner of the state, and the other arising under *habeas corpus* by Sim Robinson, after conviction of hunting without license. In the first case

112 Miss.]

Opinion of the court.

the writ prayed for was issued, but judgment was entered in favor of Brantly, and the relator appeals. In the first case, judgment set aside and vacated and judgment entered ousting defendant. In the second case, judgment set aside and judgment for relator entered, discharging him from custody.

The facts are fully stated in the opinion of the court.

Lamar F. Easterling, Assistant Attorney-General for appellant.

J. B. Harris, for appellee.

In case No. 19464: *J. M. Vardaman*, for relator.

Ross A. Collins, Attorney-General, opposed.

PER CURIAM.

These cases were argued and submitted together, and present the same legal questions. The first cause, No. 19461, is an appeal from a judgment in *quo warranto* on the information of the district attorney against appellee, Z. A. Brantley, game and fish commissioner of the state. The petition for the writ averred that appellee was unlawfully holding and exercising the functions of a public office, was claiming the right to an office in the state capitol, and was demanding hunters' licenses and threatening to impose fines upon persons violating chapter 99, Laws 1916, known as the "Game and Fish Law."

In the second cause, No. 19464, Sim Robinson was convicted before the police justice of the city of Jackson for hunting without the license required by said game and fish law. After conviction, he sued out a writ of *habeas corpus* before the circuit court of the first district of Hinds county. The writ was denied, and Robinson appeals from the judgment, so denying relief by *habeas corpus*.

The real issue presented by the appeal in the first case, the one vital question for decision, is whether Mr. Brantley legally holds and occupies the public office of state game and fish commissioner. The controlling question in the *habeas corpus* case is whether appellant Robinson was convicted of crime without authority of law. The determination of the main question in each case must be controlled by the further question whether the new game and fish statute above mentioned is constitutional, and therefore is a valid, subsisting law, and whether the law, if constitutional, is now in force and effect. If there is no such law now in force and effect, then it follows that there is no public office of state game and fish commissioner, and, furthermore, no one could be convicted for violating any of the provisions of such law.

The argument of these cases is directed to two general legal propositions. The first general proposition turns upon the question: Is chapter 99, Laws 1916, as drafted and prepared by the legislature, unconstitutional and void on its face? The second general contention is that the statute in question, if a valid law, has been repealed or nullified by a vote of the people, acting under the so-called initiative and referendum amendment to the Constitution. The discussion of each of these two general propositions has necessarily directed the attention of counsel and court to many specific points of attack on the law in question.

There are several reasons advanced why chapter 99, Laws of 1916, contravenes our state Constitution, and, accordingly, why the said law should be regarded as unconstitutional and void on its face. It is suggested that the statute violates section 20 and 175 of the state Constitution. These sections of our Constitution provide that no person shall be elected or appointed to office in this state for life or during good behavior, but the term of all offices shall be for some specified period, and that officers shall be liable to indictment for willful

neglect of duty or misdemeanor in office, and upon conviction shall be removed from office. It is contended that the county wardens and deputies provided for by the game and fish law are public officers, and that section 14 of the act authorizes their appointment and removal by the state game and fish commissioner, and that the authority to remove may be exercised by the state game and fish commissioner at any time, contrary to the provisions of the Constitution. It is further contended that the statute violates section 261 of the Constitution, which reads as follows:

"The expenses of criminal prosecutions, except those before justices of the peace, shall be borne by the county in which such prosecutions shall be begun; and all net fines and forfeitures shall be paid into the treasury of such county. Defendants, in cases of conviction, may be taxed with the costs."

Reference to section 17 of the act will show that each county warden is to receive one-half of all fines, forfeitures, and penalties collected in the county in which he holds office, for violations of the game law, and the remaining one-half is to be forwarded on the first day of each month to the state treasurer to be credited to the game and fish protection fund provided for by the statute. It is contended that the scheme provided by this new game and fish law, whereby the net fines and forfeitures are to be sent to the state capitol and paid into the state treasury to the credit of the game and fish protection fund, manifestly violates the plain provisions of section 261 of the Constitution.

Section 18 of the statute provides for a county license of two dollars for each resident hunter, a state license of five dollars for each resident hunter, and a license of fifteen dollars for each nonresident hunter. By section 20 of the act nonresidents are prohibited from trapping in the state of Mississippi. It is contended that section 23 permits resident owners to hunt on their own premises, without license, and denies to

nonresident hunters the right to hunt upon their own land without first paying for and obtaining a license. From these provisions it is suggested that the law unlawfully discriminates against nonresidents, in that it denies them the right to trap upon their own plantations or lands, and denies them the privilege of hunting upon their own lands without first obtaining a license; that every one has a qualified interest in the game found upon his own lands, and has a natural right to hunt, trap, and fish thereon, and that this right inheres in him by reason of his ownership of the soil.

It is further contended that, under section 18 of the game law, all minor members of families may hunt under the one license issued to the head of the family, and that, accordingly this unlawfully discriminates against certain other hunters. It is suggested that a large portion of the hunting and fishing is done by young men or boys under the age of twenty-one years, who, under the provisions of this act, would not be required to pay a license if they are living under the parental roof; that the amount of game which every hunter is authorized to take is limited; that under this plan a father with many sons could take a much larger portion of game and fish than many other heads of families; that the orphan boy in many instances could not avail himself of the provision of hunting under a license issued to the head of a family, but, on the contrary, would be required to pay the license. From all this it is contended that, although the fish and game equitably belongs to all the people of the state, under the requirements of this new statute there is unlawful discrimination against certain classes of citizens of our own commonwealth.

The further question presents itself, that is, if the statute under attack attempts unlawfully to divert the fines and forfeitures from the various counties and deposit them in the state treasury to the credit of the game protection fund, contrary to the state Constitu-

tion, and if the licenses provided for work an unlawful discrimination against certain classes of citizens, that then no adequate revenue is provided for maintaining the office of state game and fish commissioner, for paying the extra expenses of county wardens, and for enforcing the provisions of the statute; and, if this be the true situation, then the act does not provide a workable plan and harmonious scheme for protecting the game and fish of Mississippi, and that accordingly, the whole act should be declared unconstitutional and void. It is suggested that the legislature would not have enacted this law without the means for paying the officers charged with the duty of enforcing it; that the legislature would not have enacted it with the other objectionable features indicated; that the law is so deficient in many important particulars that the whole act should be struck down as inoperative and void.

Many reasons are also assigned why chapter 99, Laws of 1916, has not been nullified by a referendum vote of the people. On this branch of the discussion, several reasons are assigned why the referendum amendment to the Constitution has not been legally adopted and inserted as a part of our organic law. Briefly stated, the contentions are that the initiative and referendum amendment to the Constitution is void on its face, because the amendment, purporting to be only one amendment, in fact embraces two separate and distinct powers and amendments to the state Constitution, to wit the power of the people themselves to make or nullify a statutory law; and, second, the power of the people to initiate a constitutional amendment. It is furthermore claimed that this amendment did not receive a majority of the qualified electors voting at the general election at which the people undertook to adopt or approve the initiative amendment, contrary to the provisions of section 273 of our state Constitution, requiring every amendment to our organic law to re-

ceive "a majority of the qualified electors voting" at the election.

The members of this court have given to the many delicate and constitutional questions presented by these records the most careful thought and consideration. After mature deliberation, a majority of the court are convinced beyond doubt that the judgment of the learned circuit court is erroneous, and should be reversed. The several members of the court are not agreed, however, upon any one reason that should be assigned why the judgment of the lower court should be reversed. Some of the justices are of the opinion that the game and fish statute is unconstitutional on its face, and therefore inoperative and void; and they reach this conclusion regardless of the initiative and referendum amendment to the Constitution and the vote of the people thereunder. Other members of the court are of the opinion that the statute in question has been legally voted out by the people, and therefore is no longer in force and effect. Inasmuch as a majority of the court are not agreed upon any one of the many constitutional points argued and considered, and therefore no legal principle can be conclusively settled at this time, we shall forego or waive any elaborate discussion of the merits or demerits of any one of the many contentions made or constitutional questions argued. As stated by the Wisconsin court, through

MARSHALL, J.:

"A situation so extraordinary rarely occurs in judicial work. That it should move judicial minds to exhaust all reasonable efforts for harmony, as it has in this case, is most natural." Will of McNaughton; *Frane v. Plumb*, 138 Wis. 179, 118 N. W. 997, 120 N. W. 288.

The majority of the court are agreed that chapter 99, Laws of 1916, should not now be regarded in force and effect in Mississippi; and from this it necessarily

follows that there is no such public office now as that of state game and fish commissioner. It is the judgment of the court, therefore, that the writ of *quo warranto* was properly issued; that the demurrer filed by the district attorney to the special plea in bar of the defendant was improperly sustained; that the judgment entered in favor of Mr. Brantley was erroneous, and that this judgment should be set aside and vacated and a judgment entered here, declaring that no such office as state game and fish commissioner now exists, and that appellee should be ousted of and restrained from exercising the functions of any such office. We are also of the opinion that the judgment of the learned circuit court, denying the petition of *habeas corpus* to Sim Robinson, should be set aside, and, there being no dispute as to the facts, that judgment should be entered here in favor of Sim Robinson, relieving him from the conviction mentioned, and discharging him from custody. So ordered.

SYKES, J., dissents.

BECKER ET AL. v. COLUMBIA BANK.

[73 South. 798, Division B.]

1. PUBLIC LANDS. *Patents. Performance of condition precedent.*

Where a statute provided for the issuance of a patent to land on the express precedent-condition that a bond should be executed and filed, and such bond was not sufficiently executed, a patent so issued was void.

2. COURTS. *Rules of decision. Law of property.*

Where the courts of this state have decided that a land patent was void, because the requirement of the precedent execution of a bond by the statute had not been complied with, such decision established a rule of property, which, will govern subsequent cases involving the validity of such title.

Brief for appellant.

[112 Miss.]

3. COURTS. *Construction of statutes. Federal decisions. Decisions controlling.*

It is elementary that the supreme court of Mississippi above all others has the right to construe the statutes of this state.

Appeal from the chancery court of Lawrence county.
HON. R. E. SHEAHY, Chancellor.

Suit to quiet title by Columbia Bank against F. F. Becker and others. From a decree for plaintiff, defendant appeals.

Appellee was complainant in the court below, and appellants were defendants. The bill filed in the lower court prays for the cancellation of appellant's claim of title to the land in question and removal of said claim as a cloud upon complainant's title. The land in question was acquired by the state of Mississippi from United States government as swamp land, and appellee's claim of title is based upon a swamp land patent issued by the state to one Bradshaw in 1902. Appellants' claim of title is based upon a patent issued by the state of Mississippi in 1871 to the Pearl River Improvement & Navigation Company. It is claimed that this land was subsequently sold by the tax collector of Lawrence county to the state of Mississippi for taxes alleged to be due and delinquent for the year 1883, and that the state thereafter deeded the land, in 1887, to one Phillips, through whom appellants deraign title. From a decree granting the relief prayed, this appeal is prosecuted.

P. Z. Jones, for appellant.

Does the evidence show that no bond was filed? The bill in the paragraph beginning about the middle of page 3 and ending about the middle of page 4, of the record, contains and presents the issues around which this litigation is to be fought. This challenges the validity of the patent issued by the state to the Pearl

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Brief for appellant.

River Improvement & Navigation Company on June 27, 1871.

Failure to comply with the terms of the law under which the patent was issued, in that the company did not file a bond and that the bond was not approved by the Governor, and that the patent was not signed by the Governor and countersigned by the secretary of state.

The burden was on the complainants to sustain these allegations by the proof. It admitted that the state had issued a prior patent to the one under which it claimed and, unless this patent could be destroyed, the complainant would fail. It alleged that this prior patent was void because no bond was filed with the secretary of state and approved by the Governor and because the patent was not signed by the Governor and countersigned by the secretary of state.

The complainants' case must be tried on and by the issues which he presents and, if he alleges more than ordinarily is necessary, he thereby assumes the burden of proving all the charges. With this allegation, it was incumbent on the complainant to prove that (a) no bond was filed with the secretary of state, (b) that it was not approved by the Governor, (c) that the patent issued was not signed by the Governor, (d) that it was not countersigned by the secretary of state; or, failing in this, to prove the alternative proposition that the patent had been adjudicated by the courts of this state to be fraudulent.

On the same points, the complainant offered no testimony whatever. The record shows that it offered its own pleadings and the deeds under which it claimed, and an agreement as to the testimony of Becker, Dreg, and Jones. This agreement is found on pages 40 to 42 of the record, and not one word is said about the failure to file a bond, or the failure of the Governor to approve a bond, or his failure to sign a patent, or the failure of the secretary of

state to countersign the patent, nor is anything said about the fraud of the promoters of the company in procuring a patent, nor is anything said about the judgment of any court adjudicating that the patent was fraudulent.

The agreement refers to the decision of this court in *Hardy v. Hartman*, 65 Miss. 504, and admits that the attorney for defendants knew of this decision. But this opinion was not evidence in this case, it is the law controlling the decision of the court on the facts as presented by that particular case, and whether the defendants and their attorney would admit knowledge of it or not, they would be chargeable in law with knowledge of it because every person is presumed to know the law. So, we say there was absolutely no evidence offered by the complainant, to sustain this paragraph of its bill, and had the defendants introduced no testimony with their sworn answer, denying these allegations, under the pleadings and the evidence existing at the time complainants rested its case, a decree should have been given for defendants.

Mounger & Ford, for appellee.

The instant case is ruled by the decision of the supreme court of Mississippi rendered in the case of *Hardy v. Hartman*, reported in 65 Miss. at page 504, and for the convenient reference of the court, we set out the opinion rendered in that case, and the same is in the following words:

“It is not necessary to dispose of this case, to enter the field of observation or discussion suggested by the name of the Pearl River Navigation and Improvement Company. It is not shown by the record that the company ever made or filed the bond required by law as the foundation of its right or title to the land in controversy, nor does it appear from the record, that any patent signed by the governor and counter-

signed by the secretary of state, was ever issued to the company, for the land in question, or for any land.

The Act of 1871, by which the company was created, the contrary, it expressly provided that the patents to the lands signed by the Governor and countersigned by the secretary of state, should be issued by the state to the company, and it was made by the act a condition precedent to this being done, that the company should file in the office of the secretary of state, a bond with security, in the sum of fifty thousand dollars, and that the same should be approved by the Governor. There is a bond in the record which was filed in the office of the secretary of state and approved by the Governor, but it does not purport to be the bond of the company, and it is not, and cannot be regarded as such.

The proposition is too plain for argument, that if a patent issued for the land, without these conditions being complied with, it was void.

In this decision the court construed the act creating the Pearl River Improvement & Navigation Company, and held that by the terms of this act a valid bond signed by this company was required as a precedent step to the issuance of any patent by the state to this company and held that for want of execution of the same by this company in that it failed to sign this bond, that the patent issued for the land was absolutely void.

The appellant has filed three briefs in this case dated respectively February 17, 1916, the appellants take the position that the court's holding that the bond filed was void because not signed by the principal, was clearly and manifestly wrong, and they also contend later on in the brief, that the opinion in the case might have been right and the expression in the opinion that the patent was void was not necessary to the decision of the case, and *obiter dictum* to sustain their contention that the court in its decision in the Hardy-Hartman case was clearly and manifestly wrong.

Appellants cite the cases of *Adams v. Williams*, 97 Miss. 113; and *Gloster v. Harrell*, 77 Miss. 763. A cursory examination of the case of *Adams v. Williams*, will show that the supreme court held that the bond of the treasurer of a levy board was binding upon the principal, although not signed by him because of the provisions of the Code of 1892, section 3055, and Code of 1906, section 3463, which provided that such a bond if delivered as an official bond, shall be valid, even "if irregular in any respect." The case of *Gloster v. Harrell*, decided that a municipal's treasurer bond, although unsigned by the principal, was a valid bond under the provisions of the sections of the Code of 1906 and 1892, above quoted, and the decisions in both of the above cases was expressly made in view of the provisions of the statute. By reference to the Code provisions of the Code of 1857, page 136, article 186, which was carried forward without change in the Code of 1871, contained no such provisions as will be found in the Codes of 1890, 1892, and 1906, with reference to the execution of official bonds. There is no provision in this Code section of the Code of 1859, which was in force when this pretended bond is said to have been given, nor was there any provision in the Code of 1841 which either expressly or impliedly provide that a bond "irregular in any respect whatever" should not be construed to be a valid bond. Besides, it could hardly be contended that the bond furnished by the Pearl River Improvement & Navigation Company was an official bond. The authorities cited by appellants' counsel to support his contention that the principal's signature to the bond was not required, do not support his condition, but they simply and merely support the contention that an official bond under the provisions of the Code of 1880, 1882 and 1906, are not required to be signed by the principal in order that they be valid.

STEVENS, J., delivered the opinion of the court.

Without setting out the pleadings, the conflicting chains of title, or evidence in full, we think it well to state that the disposition of this case is controlled by *Hardy v. Hartman*, 65 Miss. 505, 4 So. 545. The decision of this court in the Hardy-Hartman Case has been the subject of attack more than once, and this court has uniformly declined to overrule that case. The decision established a rule of property, which should not now be disturbed. The decision was rendered by eminent jurists, who stated that:

"The proposition is to plain for argument that, if a patent issued for the land without these conditions being complied with, it was void."

The condition referred to by the court was that condition expressly provided by the statute that:

"Upon the approval and filing of said bond, said secretary of state shall, from time to time as demanded by said company, make out a patent or patents."

The bond required, according to the previous decision of our court, was not executed. It is contended by counsel for appellant that a different construction has been placed upon this act by the Federal courts, and that there should be uniformity of decision. It is elementary that this court, above all others, has the right to construe the statutes of our own state.

It is contended by counsel that the record in this case does not show noncompliance in the filing of the bond required. The record does show an agreement dictated upon the trial of the case that the bond executed was the same bond shown by the record in the Hardy-Hartman Case. It is true that the record in this case shows the issuance of a patent to the Pearl River Improvement & Navigation Company. The title thus attempted to be conveyed by this patent is now held by the appellants, and, if the bond required was not given, this title in the hands of appellants

cannot be upheld. This is a vital defect in appellants' case, which requires an affirmance of the decree entered by the trial court.

Affirmed.

DILLARD v. STATE.

[73 South. 799, Division B.]

LARCENY. Evidence. Sufficiency.

Under the facts as set out in the opinion the court held that a conviction for larceny of a steer could not be sustained.

APPEAL from the circuit court of Perry county.

HON. PAUL B. JOHNSON, Judge.

Rufe Dillard was convicted of larceny and appeals. The facts are fully stated in the opinion of the court.

D. M. Watkins, for appellant.

Ross A. Collins, Attorney-General, for the state.

Cook, P. J., delivered the opinion of the court.

Appellant was convicted upon a charge of larceny of a steer, and he appeals to this court, upon the theory that the evidence did not support the verdict of the jury.

A careful reading of the evidence produced at the trial, in our opinion, fails to establish that the animal, the alleged object of the larceny, had in fact, been stolen. Giving to the evidence full faith and credit, it appears that a steer running in the range with a herd of other cattle disappeared; that the owner of the steer instituted a search for the lost animal and failed to find it; that about six weeks after the disappearance of the steer the putrid carcass of a horned

animal was found buried within a short distance from a field cultivated by the defendant. It seems that the state and the jury concluded that the buried carcass was the remains of the lost, strayed, or stolen steer. We have searched the record in vain for any evidence warranting this conclusion.

There is not a scrap of evidence in the entire record justifying a reasonable belief that the entombed beast was the remains of the alleged stolen steer. The proximity of the grave to the defendant's field (which field seems to have known the defendant very seldom), may engender a suspicion that the defendant was the "nigger in the woodpile;" that he had some causal connection with the steer's death; but this would be a mere suspicion. Even if we assume that the defendant was there or thereabouts when the steer came to an untimely end, there is not a word of evidence to warrant the further assumption that the deceased steer or cow was the property in question.

The defendant lived some five miles from the field, which it is unjustly intimated that he cultivated, and there is some evidence tending to show that somewhere about the time the steer in question disappeared the defendant was long on beef, or, at least, that he was in possession of more beef than the law allowed to a person of his social and financial standing in the community.

There is also some evidence that the defendant about the time the entombed beast was found cautioned some of his friends who had profited by his possession of more beef than he could conveniently consume not to mention this circumstance to inquiring white folks. Taken in detail and its completed state, we are unable to see how an impartial jury could find enough evidence to justify a belief that the defendant stole the steer he was charged with stealing.

It may be conceded that he stole the buried beast, but it by no means follows that he is guilty. However

desirable it may be to convict the guilty, it is vastly more important to require that the humblest citizen must be proven guilty before he can be convicted.

Reversed and dismissed.

NEW YORK LIFE INS. CO. v. BRAME.

[73 South. 806, Division A.]

1. PLEADING. *Duplicity. Surplusage. Action on life insurance policy.*

Where in a suit upon a life insurance policy the declaration alleged insured's seven years absence, which was on demurrer amended so as to charge also that insured was actually dead. Such a declaration was not defective as an attempt to recover in one court for both a common law cause of action and also a cause of action under section 1914, Code 1906, as to presumption of death, because the legal effect of the amended declaration was simply that the insured was dead and the allegation in regard to the seven years absence of insured was surplusage.

2. DEATH. *Presumption. Fine. Death. Statute.*

Under Code 1906, section 1914, creating the presumption of death after seven years unexplained absence the burden of proof is upon the party interested in proving the death at any particular time, since in such case the law raises no presumption as to the precise time of death.

3. ACTION ON LIFE INSURANCE POLICY. *Limitations.*

Where one insured under a policy providing for the payment to the beneficiary "upon receipt and approval of proofs of death," disappeared, and the insurance company, being notified, declined to send blanks for proofs of death, taking the position that insured was alive, and sent a detective to investigate and after the expiration of seven years the insurance company did furnish such blanks, but declined to pay the claim. In such case in an action on the policy although the jury found that death occurred the day of disappearance, yet the cause of action was not barred by the six year statute of limitations, under Code 1906, section 3097, since the wording of the policy of insurance gave to the beneficiary a reasonable time within which to make out proofs of death, and in such case a reasonable time, and in fact the only time, in which the beneficiary could make out

such proofs was at the expiration of the seven years, when the beneficiary under Code 1906, section 1914, could take advantage of the presumption of death then arising.

4. *INSURANCE. Action. Interest.*

Where, on account of insured's unexplained disappearance, suit upon his life insurance policy, was not brought until after the expiration of seven years from such disappearance, and his policy provided for payment on "receipt and approval of proofs of death" of insured, and the jury found the death occurred on the day of disappearance, it was error to allow plaintiff the beneficiary to recover interest from the day of disappearance on the amount of the policy and premiums paid by insured before such disappearance, there being no receipt and no approval, and no proper rejection of proofs of death, until the filing of the suit, interest on such policy was only recoverable from the time when suit was brought. ●

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Suit by Mrs. Sue S. Brame against the New York Life Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

A. H. Longino and R. B. Ricketts, for appellant.

The original declaration presented no cause of action for recovery on the contract of insurance as shown in this case and could not therefore be amended. The court should have dismissed the suit under the operations of plaintiff's first demurrer filed in said cause and it erred in failing so to do.

The second amendment of plaintiff's declaration was improperly allowed by the court because it was a clear departure from the original cause set up by the declaration. The cause of action first presented by the pleading, relied upon a special statute, whereas by the amendment referred to it seeks recovery under the contract contained in the policy. The plaintiff cannot depart from, but must sustain and fortify the case made in the original declaration. *Fisher v. Miss.*

& *Tenn. R. R. Co.*, 3 George, p. 359. An amendment cannot be made to a declaration which would thereby change the original proceedings from one cause of action to another. 31 Cyc., p. 414. Nor which seeks to forsake the matter or cause of action formally relied on for recovery. 31 Cyc., p. 415. The cause of action alleged in the original proceedings must be adhered to. 31 Cyc., p. 416.

The cause of action must be the same, and plaintiff cannot introduce by way of amendment an entirely new cause of action, but may add a new count different to that contained in the original pleading, provided he adheres to the original cause of action. *Y. & M. V. R. Co. v. Wallace*, 90 Miss. 609; *Mahan v. Smithman*, 71 Ala. 563; *Hanchey v. Bronson*, 56 So. (Ala.) 971; *Maxwell v. Harrison*, 8 Ga. 61; 31 Cyc., 49, 411, 413.

We maintain here, as we did to the other amendment above treated, that the plaintiff's original declaration presented no cause of action against the defendant on the policy in question, in view of the said contract between the parties, and was not therefore subject to amendment in either of the two particulars allowed in this case. It is common learning that a declaration cannot be given its first life and effectiveness by way of amendment. There must first be laid a legal foundation on which to predicate the suit. This rule seems to be sustained by the great weight of authority that if there is an entire failure to state a cause of action in the original pleadings, no amendment so as to state a cause of action is permissible. 31 Cyc., p. 407 and 408.

We admit that a defective statement of a good cause of action may be cured by amendment. *Mizell v. Ruffin*, 118 N. C. P. 69.

On page 52 of the record will be found the instructions given for the appellee. No instructions were given for the appellant, although nine were requested as will appear from the record, pages 53 to 56. The atten-

tion of the court is especially directed to the first, third and ninth instruction requested for the appellant.

By the first instruction for the appellee the jury were told that if they believed from the evidence that Lex Brame, Jr., died on August 8, 1907, they should find for the plaintiff in the sum of three thousand seven hundred ninety-six dollars and forty-four cents. By the second instruction the jury were told that if they believed from the evidence that Lex Brame, Jr., did not die on August 8, 1907, "they must nevertheless find for the plaintiff for the face of the policy with interest," and in the following form, "We the jury find for the plaintiff in the sum of two thousand seven hundred forty-two dollars and forty-three cents."

The jury found for the plaintiff in the form and for the amount named in the first instruction. It will be noted that the sole issue submitted to the jury was as to whether or not Lex Brame, Jr., died on August 8, 1907. The instructions together amounted to a peremptory instruction for appellee.

The action brought by Mrs. Brame, the appellee, in January, 1915, was barred by the provisions of section 3097 of the Mississippi Code of 1906. In this case the sole issue submitted to the jury under the instructions asked by the appellee was this: Did Lex Brame, Jr., die on August 8, 1907?

By their verdict the jury answered that question in the affirmative. To the securing of that affirmative answer all of the proof introduced by the appellee seems to have been directed. In fact, it seems that under the terms of the amended declaration, the appellee intended to charge that Lex Brame, Jr., died on that date.

The appellee asked this finding of facts at the hands of the jury. She got the decision sought. So far as this appeal is concerned and so far as the interests and rights of the appellee in this case are affected Lex Brame, Jr., died on August 8, 1907.

It is clear that if Lex Brame, Jr., did die on that date, the right of action of the plaintiff accrued some time in the year 1907, not later in any event than the date of the letter from the New York Life Insurance Company which appears in the record at page 258, in which letter the appellant refused to furnish to the appellee blanks for making proofs of death.

Just here we think it well to go into some discussion of the rule which is established by the great preponderance of authority with reference to the fixing of the time of death of a person who within the rule of the common law or under the provisions of some statute is presumed to be dead on account of his unexplained and long continued absence.

There is no presumption as to the time of death. In 13 Cyc., p. 304 (59) the rule is stated as follows: "The presumption of law is always in favor of the continuance of life, but this presumption is overcome by the presumption of death that arises in the case of a person who has been absent and unheard of for seven years. This latter presumption does not, however, arise until the full period has elapsed, and when it does arise there is no reason why it should have a retroactive effect so as to defeat the other presumption which was in full force during the waiting period." *Shaub v. Griffin*, 84 Md. 557, 136 Atl. 443; *Reedy v. Millizen*, 155 Ill. 638, 40 N. E. 1028; 1 Greenleaf on Evidence, sec. 41; Jones, Comm. on Evidence, sec. 61a.

This rule has been recognized by our own supreme court in several cases of which the case of *Spears v. Burton*, 31 Miss. 555, is probably the earliest. *Davie v. Briggs*, 97 U. S. 628.

Going somewhat beyond what we think we are called upon to show in order to maintain the position we have taken, we desire to call the attention of the court to the fact that the death of an absent person will, on the production of certain evidence be presumed in less than seven years from the date that he was last

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heard from. For a full discussion of this rule the attention of the court is respectfully directed to, 1 Jones' Comm., ib. Ev., sec. 63.

The discussion just referred to is thorough and, so far as we have been able to ascertain upon a careful examination of the cases on this subject, entirely in accord with the weight of authority. We again call the attention of the court to the case of *Davie v. Briggs*, 97 U. S. 628. On account of the many points in which the case just cited is like the present case and on account of the clear presentation of the line of reasoning by which Justice Harlan worked to the conclusion announced, the cited case is of great interest here. *Springmeyer v. Sov. Camp*, 143 S. W. 872; *Metropolitan Life v. Lyons*, 98 N. E. 824; *Springmeyer v. Sov. Camp*, 129 N. W. 846; *Coe v. Nat'l Council*, Ann. Cas. 1916-B. 65.

Accordingly it is respectfully submitted for the appellant: (a) It was proper and indeed necessary for the appellee, in order to show that Lex Brame, Jr., died before the end of the seven-year period, to introduce proof tending to show that he was subjected to some great danger and proof tending to show that his character, domestic relations, affections and general disposition indicated that he would not stay away from if he were alive; (b) the appellee attempted to prove that Lex Brame, Jr., is actually and physically dead, and, further that he died on August 8, 1907; (c) the jury, on the proof introduced by the appellee and under the instructions, requested by and given for her, found that Mr. Brame died on August 8, 1907. As already stated this finding is in this case, conclusive on the appellee; (d) Since Lex Brame, Jr., died on August 8, 1907, the Mississippi statute of limitations of six years bars this suit.

Again we direct the attention of the court to a quotation from *Davie v. Briggs*, 97 U. S. 633-4. Of course, if there were no such thing as the six-year stat-

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ute of this state, the additional interest to be gained would make it advantageous to the appellee to fix the date of Mr. Brame's death as August 8, 1907. Appellee asked the jury to find that Mr. Brame died on that date and they accordingly brought in a verdict to that effect.

Appellee waited too long before bringing her suit. Every word, practically, of the testimony offered by her in the present case would have been competent to support her claim if she had sued the appellant in 1908.

With the plea of the statute of limitations interposed, the trial court should have sustained the motion made by the appellant to exclude the evidence for the appellee and should have promptly given the peremptory instruction. The court should have extended back the demurrer to the plea of the statute of limitations and so have dismissed this suit at once. All of the actions of the trial court are assigned for error, here. See the sixth, seventh and ninth assignments.

It was error to give what amounted to a peremptory instruction for the plaintiff in this case. Where there are circumstances tending to rebut the presumption of death, the question whether the person is dead or alive is for the jury on all the evidence. 13 Cyc., 202 (L. V).

With the plea of the statute of limitations interposed the trial court should have sustained the motion made by the appellant to exclude the evidence for the appellee and should have promptly given the peremptory instruction. The court should have extended back the demurrer to the plea of the statute of limitations and so have dismissed this suit at once.

George B. Power and L. Brame, for appellee.

In the brief of opposite counsel, it is claimed that it was error to amend the declaration by adding to the alleged presumption of death, the allegations of fact as to actual death to be taken in connection therewith.

Counsel say this was changing the whole nature and character of the suit and cite authorities on this subject, but they are not applicable because there was no change in the nature or character of the suit and the whole of the allegations of plaintiff were consistent. She alleged and claimed from the first that her husband was dead and invoked the presumption; then she added to this the allegations of fact going to show that he was dead. There was no reason in the world why she should not rely upon either or both propositions to establish the main fact, namely, that the assured was dead and that the policy had matured.

We do not care to discuss the numerous authorities cited by counsel as to the matter of pleading, because we do not consider those authorities applicable. The true issue was at last reached to be determined, namely, whether the defendant was dead and whether the defendant could escape under the plea of the statute of limitations.

That the allegations of the plaintiff were full and explicit as to the presumption and the circumstances going to show the actual death, etc., was a benefit and not a disadvantage to defendant because it was thereby given the fullest notice of the issue it had to meet.

This case was fully and fairly tried in the court below. After the most careful and patient hearing, the learned judge on the law and the evidence concluded that two propositions were absolutely established and that these could not possibly be questioned, namely: (1) That the assured was dead. (2) That the defendant, by reason of its acts and conduct and the acceptance and retention of the premiums, was absolutely estopped to plead the statute of limitations.

It was proper for the court to instruct peremptorily as to these two propositions, because there was no evidence to the contrary of either of them upon which a verdict could have been sustained. If either, or both, of the propositions had been submitted to the jury

and a verdict had been rendered in opposition to the conclusions arrived at, it would have been incumbent upon the court to promptly set aside the verdict as unsustainable.

Having arrived at these conclusions, which, as we have said, was inevitable under the evidence, it was the duty of the court to instruct the jury accordingly, and this was done, leaving nothing to it for decision except as to the time the death occurred. It was proper to leave this one fact open for the determination of the jury, and it was the only fact that was then legitimately subject to controversy or question. Both parties had the full benefit of offering evidence as to this.

On taking up either of the refused instructions the court will readily see that the same was properly refused, if the court was right on the two main questions, namely, that the assured was dead, and that the confessed act and conduct of the defendant, who was still holding the premiums, had been such that it was estopped to set up the statute of limitations.

Of course, the only purpose of submitting to the jury the determination of the question of the time the death occurred was to fix the date at which the right to calculate interest would begin.

It is not true, as contended, that the plaintiff had committed herself irrevocably to the proposition that the death occurred August 8, 1907. It is true that her attorney in correspondence with the New York officer of the defendant expressed the opinion that the evidence submitted showed that the death did occur August 8, 1907. But this was a mere opinion, and the facts was promptly and distinctly challenged by the company, which then took the position that the assured was not dead, and it held on to this contention up to the time it suited its purposes to reverse its position and turn upon the plaintiff with the plea of the statute of limitations. It was then and there only that the

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defendant took the position that the death occurred August 8, 1907.

Was there ever a bolder or more shameless effort to defeat an honest debt by a mere subterfuge? It is contended and was contended in the court below that the policy of the defendant only obligated the company to pay in case of absolute proof of death, and that it was not bound by the plaintiffs, merely establishing the presumption of death in connection with the facts which were submitted showing, especially in the absence of any proof to the contrary, that the assured probably died or was killed on the night of August 8, 1907. It was gravely argued in the court below and is stated in the record that to compel the defendant to pay without direct, positive proof of actual death, would be violative of its rights under the fourteenth amendment of the Federal Constitution. With all due respect to counsel we regard this as mere sophistry.

The policy did not provide for direct positive proof of actual death but it is a promise to pay upon the proof of death. This proof could be established of course by circumstances, and it was established also by relying upon the presumption of death arising after the lapse of seven years.

The books are full of cases in which insurance companies have been made to pay on the basis of such presumption only. But when we take into consideration here, not only the strong proof of facts and circumstances going to show death, but also the presumption after the lapse of seven years, there is no room for the argument that there was not sufficient evidence to show that the policy had matured.

It is perfectly competent for an insurance company to provide in its policies that the loss will not be paid upon proof of mere absence, or upon the presumption of death based upon the lapse of time, but that positive proof or actual death shall be made.

In the *Keith Case*, 149 N. W. 225, heretofore cited in this brief, there was a policy to this very effect, but the change in the form of the policy in that particular case had been made after the death, and hence this does not effect the decision as an authority. We refer to this merely for the purpose of showing that the defendant could have put in its policy a stipulation which would have required proof of actual death but no such stipulation is in the policy.

We desire to call the attention of the court especially to the case of *Behlmer v. Grand Lodge* (Minn.), 26 L. R. A. (N. S.) 305, 123 N. W. 1071. We do not care to consider these separately or at any length. The main case relied on by the defendant is *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086. But that case does not militate in the slightest degree against anything for which we contend. In the first place, that was not an insurance case but related to the title to land.

In the next place there was not involved in it any question whatever of estoppel. The case simply states the doctrine that where one has been absent seven years without having been heard of, the presumption arises that he is dead, but there is from this proof no presumption of the time of death. This is a doctrine which we do not controvert. It is also set forth in 13 Cyc. 290. Notwithstanding the presumption and notwithstanding the facts that were introduced in evidence going to show that the death probably occurred on the night of August 8, 1907, there was nothing here to prevent the defendant, or either side, from proving as an absolute fact that the death occurred at a different time. It would have been perfectly competent for the defendant to have proved that the death occurred August 8, 1907, or five years later, or at any particular time. It was not shut off from making any such proof as it may have had as to the actual time of death. If it had been shown, for instance, that the death oc-

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curred five years after the disappearance, the only effect of this would have been to bind the company to pay interest from that time.

Here the proof undoubtedly shows that the assured was dead. It undoubtedly shows also that the defendant was, by its acts and conduct, estopped to rely upon any statute of limitations.

Then nothing was left under the instructions of the court except for the jury upon a consideration of all the facts and circumstances to decide when the death occurred, and the verdict fixed the time as of the date of the disappearance. This was solely a matter for the jury to decide under the evidence and the instructions of the court.

SYKES, J., delivered the opinion of the court.

Suit was instituted in the circuit court by Mrs. Sue S. Brame, plaintiff (appellee here), against the New York Life Insurance Company, based upon a policy of insurance issued by the defendant upon the life of Lex Brame, Jr., the husband of appellee, in which policy the appellee is the payee or beneficiary. By said policy the insurance company agrees to pay the beneficiary one thousand eight hundred dollars "at the home office of the company, in the city of New York, immediately upon receipt and approval of proofs of the death of Lex Brame, Jr., the insured, and in addition thereto a sum equal to the annual premium on this policy, multiplied by the number of years this policy shall have been in force, including the year in which death occurs, provided such death shall occur before the twenty-seventh day of March in the year nineteen hundred and nineteen."

The material averments of the original declaration necessary to be noticed by us for an understanding of this opinion are: That on August 8, 1907, Lex Brame, Jr., left Jackson, Miss., the place of his resi-

dence, on a business trip, from there going to Vicksburg, Miss. He disappeared in Vicksburg on the night of August 8, 1907, and has either remained beyond the sea or absented himself from this state, or concealed himself in this state successfully, for seven years without being heard of; that plaintiff spared no expense in her efforts to locate her husband, and kept up a search for him from the time of his disappearance until the filing of this declaration on January 16, 1915; that the fact of his disappearance was published in the newspapers far and wide, with descriptions of the missing man. Rewards were offered, and his photographs were scattered broadcast with the police departments over the country, and also with various fraternal organizations of which the said Lex Brame, Jr., was a member, but nothing has been seen or heard of the missing man since the night of his departure. Letters of executorship by the chancery court of the first district of Hinds county were granted plaintiff upon the estate of the missing man after he had been missing seven years. Plaintiff avers that on September 15, 1914, she furnished the defendant company properly authenticated copies of the proceedings of the chancery court above referred to; that she also furnished said company other further and additional proofs and all proper proofs required under the circumstances; that the defendant company, however, has failed and refused to pay the amount of said policy. Plaintiff demanded judgment for the one thousand eight hundred dollars together with interest thereon from August 8, 1907, and the further sum of two hundred eighty-six dollars and forty-four cents, premiums paid by Lex Brame, Jr., prior to August 8, 1907, with legal interest thereon from the said date, and the further sum of six hundred thirteen dollars and eighty cents, premiums paid by her with legal interest from the respective dates of payment. A demurrer was interposed to this declaration and sustained

by the court upon the theory that the declaration failed to allege the actual death of the insured. The declaration was then amended by an averment to the effect that the insured was actually and in fact dead and that he died on August 8, 1907. Various other pleadings were had in the case which are unnecessary to notice. A plea of the general issue to the amended declaration was filed, and also a plea setting up the six-year statute of limitations. A replication to the plea of the statute of limitations was filed, in which it was averred that the defendant was estopped by its conduct in receiving the premiums after it had full knowledge of the disappearance of the insured, and further averring that the statute did not bar this suit, because there was so much doubt and uncertainty as to whether or not Brame was dead that said fact could not be established until the expiration of seven years from the date of his disappearance, in order to give the plaintiff the benefit of the presumption of death arising at the end of this time. A demurrer was overruled to this replication.

The court, at the instance of the plaintiff, gave the two following instructions:

“(1) The court instructs the jury for the plaintiff that, if they believe from the evidence that Lex Brame, Jr., died on August 8, 1907, then the jury will find for the plaintiff for the face of the policy with six per cent. interest from that date, and also for all of the premiums paid by the said Lex Brame, Jr., prior to that date, at the tabular annual rate, with six per cent. interest thereon from August 8, 1907, and also for all of the premiums paid since August 8, 1907, at the tabular annual rate, with six per cent. interest thereon from the respective dates on which the same were paid, and the form of the jury's verdict would be: ‘We the jury, find for the plaintiff in the sum of three thousand seven hundred ninety-six dollars and forty-four cents.’

“(2) The court instructs the jury for the plaintiff that, should they believe from the evidence that Lex Brame, Jr., did not die on August 8, 1907, they must nevertheless find for the plaintiff for the face of the policy, to wit, two thousand six hundred forty-nine dollars and seventy-five cents, with interest at the rate of six per cent. per annum from August 8, 1914, and the form of their verdict would be: ‘We the jury, find for the plaintiff in the sum of two thousand seven hundred forty-two dollars and forty-three cents.’”

All instructions requested by the defendant were refused.

An examination of the two above instructions shows that the jury was first peremptorily instructed to return a verdict in favor of the plaintiff; second, that if they believed from the testimony Lex Brame, Jr., died on August 8, 1907, then they should assess the amount of recovery in accordance with instruction No. 1; third, if they did not believe the insured died on August 8, 1907, then their verdict would be for the plaintiff and the amount of damages would be assessed as if Brame died on August 8, 1914. The jury returned a verdict in accordance with the first instruction, which, in effect, means that they found that Brame died on August 8, 1907, viz. the night of his disappearance in Vicksburg.

The testimony introduced on the trial necessary to be referred to is: That Lex Brame, Jr., left his home in Jackson, Miss., on a business trip, expecting to be gone for only a day or two. He went from Jackson to Vicksburg, thence to Valley Park, and back to Vicksburg on the night of August 8, 1907. He talked to a number of friends and acquaintances between the time of leaving Jackson and the time he was last seen in Vicksburg. He seemed in good health and spirits. He had supper the night of his disappearance at a hotel in Vicksburg, in company with a friend of his from Jackson, after which they attended

a picture show. The friend then left to catch a train to return to Jackson. Brame requested him to telephone Mrs. Brame that he was alright and would be home the next day. A little while later Brame had a pleasant conversation with a friend of his, one Mr. Fitzgerald, in front of the hotel. At that time he was in good spirits and seemed alright. From his conversation with the friend with whom he took supper and with Mr. Fitzgerald it is inferred that Mr. Brame walked down under an electric light near the river or bayou in Vicksburg for the purpose of reading a book (*The Wandering Jew*). He has never been heard of since. He left in his room at the hotel his coat with mileage book and other papers and his grip. About six months after his disappearance his watch was found on a bank of the bayou, which at the time of his disappearance was under water. Some time after that his straw hat was found in the possession of a negro in Vicksburg. Mr. Brame was a lawyer by profession, a man of about thirty-six years of age, in good health. In addition to his wife he had two children. He was in partnership with his uncle, Judge Lex Brame, for whom he was named, in the practice of law. The firm was doing a good practice. His home life was happy and in every way agreeable. He was an affectionate husband and father. In addition to his law practice he had various real estate investments around Jackson. His liabilities amounted to eight or ten thousand dollars, but his assets at the time of his disappearance were amply sufficient to make him solvent. There is some testimony in the record that he was either guardian or administrator for some estate, and that as such he had received a trust fund of about two thousand one hundred dollars, which fund he had deposited to his credit in a bank, and had probably used in his private business. This accounting would have to be made in January, 1908, to the chancery court of Hinds county. From all the

testimony, however, we are thoroughly satisfied that Mr. Brame would have had no trouble in making this accounting in a proper way. In fact, at the time of his disappearance the testimony shows that he had almost consummated a sale of some land to a railroad company for a right of way which would have given him ample funds to have paid this money into the chancery court in January. All of the testimony introduced was by the plaintiff, the defendant offering none whatever.

The appellant contends that the case should be reversed, first, because the plaintiff in her declaration first attempted to allege a cause of action under section 1914 of the Code, and when a demurrer was sustained thereto she then alleged the fact of his actual death, which was, in effect, an attempt to recover in one count of a declaration for a statutory cause of action, and also for a common-law cause of action.

We think, however, that this point is not well taken because the legal effect of the amended declaration is simply that the insured is dead. It is true that there are a number of allegations contained in the declaration which are surplusage. All that the plaintiff need have alleged about the death was simply the fact of the death, and that plaintiff had sent the insurance company proper proofs of the same. It was proper for the court to have allowed plaintiff to amend her declaration.

It is next contended that the cause of action is barred by the six-year statute of limitation (section 3097, Code of 1906). This, to our mind, is the most serious question in the case. The suit was filed more than seven years after the disappearance of Brame. The jury found that there were facts and circumstances showing that Brame died on August 8, 1907, or more than six years before the filing of this suit. Section 3097, Code of 1906, provides:

“Actions to be Brought in Six Years.—All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.”

It is therefore imperative to ascertain when this cause of action actually accrued. The insurance policy provides that the insurance company agrees to pay the amount due under the policy “immediately upon receipt and approval of proofs of the death of the insured.” The testimony in the case shows that shortly after the disappearance of the insured a full account of his disappearance was made by his uncle to the insurance company, giving the insurance company, all of the facts connected with the disappearance. In this letter to the company Judge Brame stated that, in his opinion, his nephew died in Vicksburg the night of his disappearance. A number of affidavits of witnesses, substantiating the facts and corroborating his letter, were also sent to the company at the same time. The defendant company has printed blanks which it sends to beneficiaries upon which to make out proofs of death. In this case the company declined to send these blanks, but took the position that it believed the insured to be alive. It also sent a detective down to thoroughly investigate the matter. The attorney for the plaintiff and other relatives of hers lent every assistance to this detective during his investigation, and gave him all the facts they had relating to the disappearance. The beneficiary herself declined to believe that the worst had happened. She believed that her husband was alive and would return home. As time passed she hoped against hope. Now and then there would come a rumor that her husband had been seen in New Orleans. This rumor was run down. Another that he had been seen in Hot Springs. This proved to be false. Thus matters went on until the expiration of seven years after the date of his disappearance. At that time another request was made of the insurance

company for blanks upon which the proof of death claim could be made. This time the company furnished them, but finally declined to pay the claim, which necessitated the plaintiff to file this suit. When the plaintiff first made a full report of the disappearance of her husband to the defendant and furnished it with affidavits about the same, upon the company's refusal to pay the claim at that time, one of two courses was open to her. Either she could accept the statement of the company that the proof of death was not satisfactory and try and strengthen the same, or she could have insisted that it was satisfactory and that the company absolutely refuse to accept her proof of death, and, if finally refused, then she could have instituted suit, in which event the burden of proof would have rested upon the plaintiff to prove the fact of the death of her husband, or her other course, and the one which she pursued, was to wait either until she could make more satisfactory proof of death or until the expiration of seven years when she could rely upon the common-law presumption of death which arises when one has been absent from his home without being heard of for seven years. In this latter event the plaintiff only has to prove the unexplained absence for seven years of the insured from his home, from which event the law presumes that he is dead. No presumption arises, according to the weight of authority, as to the time of the death. The burden of proof is upon the party who wishes to prove the death at any particular time within the seven years. This presumption of death arising from the seven-year absence may be, of course, rebutted by testimony. In this case there was no testimony tending to rebut the presumption of death. It was therefore proper for the court to instruct the jury, as a matter of law, that Lex Brame, Jr., was dead. As is said in 1 Greenleaf on Evidence (15 Ed.), section 41; "Thus, where the issue is upon the life or death of a person, once shown to have been living, the burden

of proof lies upon the party who asserts the death. But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party."

"A person shown not to have been heard from for seven years by those, if any, who, if he had been alive, would naturally have heard of him, is presumed to have been dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the party who asserts it." Stephen, Digest of Evidence, art. 99.

The rule is thus briefly stated in Jones' Commentaries on Evidence, vol. 1, section 61:

"Like all other rules, it took its shape from necessity—the necessity of settling property rights and very often *status*. As the courts had to resort to the presumption of the continuance of life, in the absence of direct proof of life or death, in order to settle important rights which were often involved, it became equally necessary to adopt some counter presumption in classes of cases where the death of the person would in the ordinary course of events seem more probable than the continuance of life. Accordingly, in analogy to certain English statutes, the courts adopted the rule that 'a person, shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead; unless the circumstances of the case are such as to account for his not being heard of without assuming his death.'"

In America this rule has generally been applied only to those who are absent from their home. The rule is thus stated in 8 R. C. L. section 5, p. 708:

"By the English common law, since James I, at the close of a continuous absence abroad for a period of

seven years, during which nothing is heard from the person, death is presumed; but the presumption is open to be rebutted by proof or counter presumptions. This is the rule very generally adopted in this country, either by statutory enactments or adjudications following the common law, and it is almost universally held that for all legal purposes a presumption of his death arises from the continued and unexplained absence of a person from his home or place of residence without any intelligence from or concerning him for the period of seven years. The fact that the absent person is a fugitive from justice does not prevent the presumption from arising, but is admissible to rebut the presumption of death."

"The view generally obtaining in England and followed by a number of courts in this country is to the effect that, in the case of an unexplained absence of a person for seven years, the law raises no presumption as to the precise time of his death." 8 R. C. L. section 7, p. 711.

"Opposed to the presumption of the continuance of life, and of sufficient force to overcome it, is the presumption of death which arises in the case of a person who has been absent from his last or usual place of residence and from whom no tidings have been received for a considerable length of time. The length of absence necessary to raise the presumption of death is not governed by any arbitrary rule, but, as some general rule is necessary, seven years have been usually established as the time, the lapse of which is sufficient to raise this presumption." 13 Cyc., pp. 297-298.

See also, note, 104 Am. St. Rep. 198.

Had Mrs. Brame instituted this suit before the expiration of the seven years, the fact of proving the actual death of her husband would have devolved on her. The insurance company elected at that time to treat these proofs as not being satisfactory. Mrs.

Brame was not willing to risk a lawsuit at that time, and she therefore did not take issue with the insurance company on this question, but continued to pay the premiums on the policy for a period of seven years. It was impossible for Mrs. Brame to have made any other or more satisfactory proof of death before the expiration of the seven years than she had already made. She was unwilling to bring the matter of collecting this policy to an issue with the insurance company before the expiration of this period. She therefore did not insist upon the company finally approving or rejecting her proof of death until this time. While there are a number of cases cited by counsel on both sides to sustain their various contentions, very few of these cases are in point upon this exact question. Most of the cases cited by appellant are cases where the testimony tended to show that the absent party had died at a particular time and in a particular way. The testimony in two of these cases, for example, showed that the absent parties had been traced by their footprints to the banks of rivers a few days after their disappearance. And in those cases there was ample testimony for a jury to have found a few days after the disappearance that these parties were drowned. Other cases are where persons embarked on vessels which encountered storms and the ships were not heard of after that time. Another case is where a man disappeared from a steamboat and the testimony showed that it was impossible for him to have lived in the water but a few minutes, and his absence could not be explained in any other manner except that he had either jumped or fallen overboard. To this effect are the following cases: *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086; *Harvey v. Insurance Co.*, 200 Fed. 925, 119 C. C. A. 221; *Coe v. National Council, etc.*, 96 Neb. 130, 147 N. W. 112, L. R. A. 1915B, 744, Ann. Cas. 1916B, 65.

In the case at bar, however, without the aid of the presumption of death, a jury would not have been authorized, nor would a court have permitted a verdict to stand, which found that the insured died on the night of his disappearance in Vicksburg. It is only when the facts of the disappearance are considered in connection with the time of his absence that a jury is authorized in finding as they did in this case.

The action of the defendant company in refusing to pay this claim in the first instance, on the ground that Brame was not dead, and that no satisfactory proofs could therefore be furnished it at that time, and the acquiescence by the plaintiff in this decision of the defendant prevented the cause of action from accruing at that time and continued the matter in abeyance. A somewhat similar case is that of *Keith v. Modern Woodmen, etc.*, 167 Iowa, 239, 149 N. W. 225, L. R. A. 1915B, 793. In the Keith Case the insurance company was notified of all of the facts and circumstances relating to the disappearance of the insured, and upon being requested by one of the beneficiaries as to what they should do, an officer of the company wrote them, in effect, that if they believed their father was dead, it would probably be worth while to keep his certificate in force for the next six years, as it was customary for the company to pay a claim after a continuous disappearance of seven years. The court in that case held that the insurance company was estopped from pleading the six-year statute of limitations.

A case, however, very much like the one under consideration is that of *Behlmer v. Grand Lodge, A. O. U. W.*, 109 Minn. 305, 123 N. W. 1071, 26 L. R. A. (N. S.) 305. In that case the insured, Behlmer, disappeared. His wife paid the premium on his insurance policy for one year. She then waited six years, or until seven years had elapsed since his disappearance, and requested the company to furnish proper blank forms on which

to make proofs of death. The company declined to do so, and she filed suit. The company interposed a plea of the six-year statute of limitations. The insurance certificate in that case provided that proofs of death of any member should be furnished by the beneficiary and filed with the grand recorder before the lodge would in any way be liable. The jury found that the insured died during the life of the policy. We quote from the opinion of the court as follows:

“The question before the court then turns upon whether respondent was compelled to act upon the evidence of death available at the time she stopped payments, or whether it was permissible for her to avail herself of all the circumstances surrounding the case not only prior to July 29, 1902, but in addition thereto evidence growing out of the presumption arising from seven years’ absence of the insured. If she was limited by the terms of the contract to the evidence before her at the time she stopped payments, then, in our opinion, she failed to present the proofs within a reasonable time; but if, under any permissible construction of the contract, she had the privilege of waiting until the presumption of death arose before submitting the proofs of death then she offered to present proofs, and commenced this action within a reasonable time after such presumption accrued, and the action is not barred.

“Much may be said on both sides of the question; but a majority of the court are of opinion that respondent was not restricted to the evidence available to her at the time she stopped making payments on the certificate, July 28, 1902, for the reason that, while such evidence seems to have satisfied her that her husband was dead, yet there was then no known evidence by which his death could have been legally established. An attempted proof of his death before the expiration of the seven years would have been necessarily insufficient, a nullity. A party is not bound to do a useless thing. The certificate did not require the proofs to be

filed within any particular time, and hence a reasonable time, in view of all the circumstances of the case, was a compliance with the contract. In an ordinary case of death, where the proofs to establish it are available, there is no reason for the application of the rule of evidence growing out of the presumption of death after seven years' disappearance, and in such case the beneficiary would be bound to furnish the proofs within a reasonable time, which might be a few days, weeks, or months, according to the circumstances; but in a case where there is no positive evidence, and death can only be established with the aid of the presumption after the period of seven years has elapsed, why should the beneficiary be required to make out a case from proofs which are necessarily incomplete?

“Appellant insist that, in the absence of any provision in the contract limiting the time within which the proofs must be filed, reasonable time is to be measured by the statute of limitations, viz. six years, which in this case expired July 29, 1908, that in no case has the beneficiary more than six years from the date of death to file the proofs thereof, and that the action must be brought within a reasonable time thereafter. According to this construction, all certificates become void if proofs are not furnished within six years from the date of death. Is that the meaning of this contract? Such associations are organized for the express purpose of providing a beneficiary fund for those members who contribute for the benefit of the beneficiaries in other certificates, and unless it clearly appears from the language of the contract that it was intended to cut off, without relief, those cases where evidence of death cannot be secured within six years, such construction should not be adopted. It is manifestly just that beneficiaries who have paid the assessments up to the time of the death of the insured should receive the reward for carrying the burden. When, from the circum-

stances, the presumption arising from seven years' absence is necessary to complete sufficient proof of death, reasonable time to present such evidence after it accrues is necessary in order to make the certificate of any value to the beneficiary.

"We believe the proper construction of this class of contracts to be that a cause of action does not arise until proofs of death are furnished, and that the time for furnishing the same is not limited to six years from the time of death, but shall be made within a reasonable time after death, according to the circumstances of each particular case, and it is our opinion that the fair and reasonable meaning of the contract is that the parties intended that the beneficiary should have the benefit of the evidence of death arising from the disappearance of the insured for the period of seven years, other evidence of death being in itself insufficient, that respondent did not waive this right by assuming that the insured was dead, and in stopping payments, but that she tendered the proofs and commenced the action within a reasonable time after the evidence accrued."

In a case of this kind it is necessarily uncertain whether or not the insured is dead. It is therefore impossible for the beneficiary to make out proper or satisfactory proofs of death until the expiration of the seven years, unless there are such facts and circumstances surrounding the disappearance as would strongly point to the insured having met his death at that time. To this class of cases belong those above referred to, where the facts indicated that the insured had been drowned or had been killed in a battle or in a storm. In cases like the one at bar, where both the insurance company and the beneficiary were uncertain as to the fact of the death, it would be harsh, inequitable, and unjust to hold that the statute of limitations was applicable. The very wording of the policy of insurance, as above set out, gives to the beneficiary a reasonable time within which

to make out proofs of death; and in the case at bar, a reasonable time, and the only time, in fact, at which she was ever able to make out these proofs was when she was able to take advantage of the presumption of death arising at the end of seven years.

The lower court was in error, however, in granting its first instruction to the jury, in this respect only: That instruction authorized the jury to allow the plaintiff to recover interest at the rate of six per cent. on the amount of the policy and the premiums paid by the insured before August 8, 1907. The insurance in this policy only promised to pay the same after receipt and approval of proofs of death. There was no receipt and no approval, and no proper rejection of these proofs of death, until the filing of this suit on January 16, 1915. No interest is recoverable, therefore, on the amount named on the face of the policy and on the premiums paid by Lex Brame, Jr., until after January 16, 1915. The judgment of the lower court allowing interest on the premiums paid by appellee from the date of payment was correct.

The judgment of the lower court will be set aside, and judgment entered here in favor of appellee in accordance with this opinion.

Affirmed.

MOSELEY v. STATE.

[73 South. 791, Division B.]

CRIMINAL LAW. *Argument or prosecution. Invoking race prejudice.*

Where a negress was being prosecuted for selling whisky and the only witness for the state was a white man, it was reversible error for the district attorney to state to the jury, "It is just a question whether or not you believe this negro or the white witness," naming him, and his retort when appellant's counsel

112 Miss.]

Brief for appellant.

objected, to further say "she is a negro; look at her skin; if she is not a negro I don't want you to convict her" where the court when appealed to, did not rule on the objection but merely said, "well what is she."

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Anna May Moseley was convicted for selling whiskey and appeals.

The facts are fully stated in the opinion of the court.

G. E. Garner, for appellant.

It is needless to call the attention of the court to the fact that the facts in this case are closely disputed, as there were only two witnesses, the witness for the state and the appellant herself, and so far as the appellant is concerned, this is nearly always the case, as one under this charge can never know when, where and the circumstances upon which, the state expects to make out its case. This being the case we submit that the errors complained of are the more harmful, and that under the law of the state of Mississippi as laid down and adopted by this honorable court, this conviction cannot stand.

I most earnestly call the attention of the court to the case of *Hardaway v. The State*, 54 So. 833, which is a case similiar in all particulars, and yet, the errors in that case could not have been so prejudicial as in the case at bar. There was not a repetition of the statement; counsel did not state: "Well if she is not a negro, I don't want you to convict her, and the court did not ask without further remarks: "Well what is she."

We submit that cases of this kind are easily made and very hard to disprove to say the least of them, and when it is as close upon the facts as it appears here, no racial prejudice should be allowed to enter into the consideration thereof. Was it not enough that the jury

sitting there as they did, seeing the witnesses and hearing them testify, should decide it without this suggestion and statement of counsel?

We take it, that in the face of the case of *Hardaway v. The State*, *supra*, it is useless to cite further authorities and respectfully submit that the cause should be reversed.

Ross A. Collins, Attorney-General, for the state.

Counsel for appellant contend the remarks of the prosecuting attorney constitute reversible error, and that this case falls within the rule as announced in the case of *Hardaway v. State*, 54 So. 833. The two cases are not at all similar. In the *Hardaway* case the prosecuting attorney appealed to race prejudice by suggesting to the jury that they believe the state witness instead of the appellant, because the state witness was a white man and the appellant was a negro. In the case at bar no such appeal or suggestion was made. There was no suggestion, directly or indirectly, in the remark: "It is just a question whether you believe this negro or Mat Edwards," that the jury should disbelieve the appellant because she was a negro. There is not even a hint in this expression that the woman should be disbelieved because she was a negro, but on the other hand the question is put squarely up to the jury as to which they believe—Mat Edwards or the negro woman.

As, for the remark, "She is negro; look at her skin. If she is not a negro, I don't want to convict her," it certainly could not have prejudiced the jury against the appellant. From this record it must have been perfectly obvious to the jury, as well as to every man in the courtroom, that appellant was a negro. She was referred to during the examination of the witnesses, both by the prosecuting attorney and her own attorney, as "nigger" and "darkey." The fact that the jury was directed to "look at her skin" could have meant

but one thing, and that was, that any one could tell at a glance from the color of her skin and her complexion that she was a negro. The jury most certainly did not get the idea from the remark, "If she is not a negro, I dont want you to convict her," that the prosecuting attorney meant to tell them that if they should believe she was white they should acquit, but if a negro, they should convict. It is perfectly mainfest that he meant to, and did, convey the meaning that there was absolutely no question about her being a negro; that there was no more doubt as to this fact than as an officer of the law, he desired to see all violaters of the law convicted.

I respectfully submit that the remarks complained of do not constitute error, and that the case should be affirmed.

Cook, P. J., delivered the opinion of the court.

Appellant was indicted, tried, and convicted for selling a bottle of whisky.

Appellant is a negro, and the sole state witness was a white man. The white witness testified that he bought a pint of whisky from the negro defendant, paying her therefor one dollar. The defendant denied the commission of the crime charged in detail and *in toto*.

The district attorney, in his closing argument to the jury, said:

"It is just a question of whether or not you believe this negro or Matt Edwards."

Appellant's counsel objected to this statement of the district attorney, whereupon the district attorney "rubbed it in," by this retort:

"She is a negro; look at her skin. If she is not a negro, I don't want you to convict her."

The court did not rule upon the objection—he merely said, "Well, what is she?" It will be seen that the representative of the state staked his case upon the

question as to whether or not the defendant was a negro. If she was a negro, and the state's witness was a white man (which latter fact seems not to have been contradicted), then the district attorney demanded that the law of the land would be vindicated only by a conviction of the defendant. So we have a case wherein the very important fact of the race of the defendant was put in question, and when the jury, by an inspection of the skin of the defendant, or that part of same visible to the jury, determined this crucial question in favor of the state, it logically followed that a verdict of guilty would be returned, and was returned. The trial judge, by ignoring the objection of appellant's counsel, seems to have approved the issue presented by the lawyer for the state. True, some casuists make bold to assert, from a moral point, that the purchaser of whisky is, at least, quite as bad as the seller. But, to keep safely within the issue presented, this point was not urged by defendant. The jury decided, first, that the witness was a white man, and the defendant was not only of African descent, but more, that she was a female, and the concurrence of these facts, necessarily demand that the issues presented should be determined in favor of the prosecutor. It is our opinion that the guilt of the defendant must be proven beyond all reasonable doubt, and that the color of her skin, the race to which she belonged, and her sex had nothing to do with the case, except as an appeal to race antipathy and prejudice. This injection of race question into court trials has been uniformly condemned by this court. *Hardaway v. State*, 99 Miss. 223, 54 So. 833, Ann. Cas. 1913D, 1166.

Reversed and remanded.

EQUITABLE LIFE ASSUR. SOC. v. BRAME.

[73 South. 812, Division A.]

1. INSURANCE. *Recovery on policy. Interest.*

In a suit on a life policy, providing for payment "on receipt of satisfactory proofs of death of the assured," where assured disappeared and proofs were not made until seven years thereafter, and shortly before the bringing of the suit on the policy, the insurer was not liable for interest on the amount of the policy before the commencement of the suit, although it was shown that assured died on the date of his disappearance.

2. INSURANCE. *Payment of premiums. Recovery. Interest.*

Where insured in a life insurance policy disappeared and his beneficiary continued to pay premiums on such policy until the expiration of seven years from his disappearance, she could recover premiums so paid and interest thereon from the dates of payment respectively, if it was found that he died on the date of his disappearance.

APPEAL from the circuit court of Hinds County.

HON. W. H. POTTER, Judge.

Suit by Mrs. Sue S. Brame against the Equitable Life Insurance Society. From a judgment for plaintiff, defendant appeals.

The facts upon which this case was tried are set out in the case of *New York Life Insurance Co. v. Brame* (No. 18576), decided same date, and reported in 73 So. 806.

The instruction referred to in the opinion is as follows:

"(1) The court instructs the jury for the plaintiff that, if they believe from the evidence that Lex Brame, Jr., the assured, died on August 8, 1907, then the jury will find for the plaintiff for the face of the policies, with six per cent. interest thereon from August 8, 1907, and also for all the premiums paid since that date with six per cent. interest thereon from the respective dates on which the same were paid, and the form of the jury's

verdict would be: 'We the jury, find for the plaintiff in the sum of four thousand six hundred thirty-eight dollars and seventy-five cents.' "

Mayes, Wells, May & Sanders, for appellant.

Geo. B. Power and *L. Brame*, for appellee.

SYKES, J., delivered the opinion of the court.

The opinion this day delivered in the case of *New York Life Insurance Co. v. Mrs. Sue S. Brame*, 73 So. 806, is also decisive of this case.

The first instruction given for the plaintiff was erroneous in this respect: The policies here sued on contain the clause as follows:

"On receipt of satisfactory proofs of the death of the said assured, provided this policy is then in force, agrees to pay," etc.

The company was not required to pay this money until a reasonable time after it had received satisfactory proof of death. The proofs were not attempted to be made satisfactory to the company until a short time before this suit was filed on January 16, 1915. The plaintiff was therefore not entitled to recover interest on the amount named in the policy before January 16, 1915. She was entitled to recover interest on the premiums paid by her from the date of their payment.

The judgment of the lower court will be set aside, and judgment entered here in favor of appellee in accordance with this opinion.

Affirmed.

BARKSDALE v. LEARNARD ET AL.

[73 South. 736, Division A.]

1. **VENDOR AND PURCHASER. *Innocent purchaser. Record notice.***
A purchaser of land is not charged with constructive notice of the recitals of deeds of trust thereon which do not appear in his chain of title.
2. **VENDOR AND PURCHASER. *Innocent purchaser. Duty of inquiry.***
That a purchaser of land had actual knowledge of a deed of trust thereon, imposed upon him no duty of inquiring into the state of the title, other than that with which he was charged by reason of such deed of trust being of record.
3. **TENANCY IN COMMON. *Acquisition of superior title.***
Where one cotenant purchases an outstanding superior title to the common property, he acquires thereby the legal title to the whole of it, but holds such title in trust for the benefit of those of his cotenants who may wish to avail themselves of it by contributing or offering to contribute their proportion of the purchase money, which right, as between him and his cotenant, will not be barred by mere lapse of time, but only when the delay to assert it, is accompanied by circumstances which give rise to an estoppel.
4. **VENDOR AND PURCHASER. *Innocent purchaser. Undisclosed trust.***
A *bona-fide* purchaser from one having the legal title, takes it free from a trust for a cotenant of the seller when the purchaser had no actual or constructive notice of such trust.
5. **VENDOR AND PURCHASER. *Innocent purchaser. Equity of infant.***
An infant having an equity in land has no better standing than an adult, as against an innocent purchaser of the land from one having the legal title.
6. **VENDOR AND PURCHASER. *Innocent purchaser.***
A purchaser from an innocent purchaser stands in the position of an innocent purchaser, irrespective of notice.

APPEAL from the chancery court of Monroe county.

HON. A. J. MCINTYRE, Chancellor.

Suit by H. Clay Barksdale against Mrs. J. P. Learnard and others. From a decree, complainants appeal, and D. R. Herron takes a cross appeal.

The facts are fully stated in the opinion of the court.

Gates T. Ivy and Roberds & Beckett, for appellant.

Critz & Critz, Paine & Paine and Leftwitch & Tubb, for appellees.

SMITH, C. J., delivered the opinion of the court.

This is a suit for the partition of land instituted by appellant, who claims to be the owner of a one-half interest therein.

In 1887 Dr. T. W. Spruill died seised and possessed of the land, leaving as his heirs at law his widow, two sons, and a daughter, Mrs. Maggie S. Barksdale. In May, 1892, Mrs. Spruill and her two sons, by deed duly executed and recorded, conveyed their interest in the land to Mrs. Barksdale, and she continued the owner thereof until her death, which occurred October 2, 1893. She left surviving her as her sole heirs her husband, H. C. Barksdale, and one son, H. Clay Barksdale, the appellant who was then an infant four years old. In January, 1893, prior to her death, Mrs. Barksdale and her husband executed a deed of trust to Hearn & Co. to secure the payment to him of their joint notes aggregating the sum of three thousand, three hundred thirty-six dollars and fifty cents due January 1, 1894 and 1895, and advancements to be thereafter made by Hearn to them. That the grantors in this deed of trust were husband and wife was not disclosed either in the body or in the acknowledgment thereof. On February 1, 1894, after Mrs. Barksdale's death, her husband, H. C. Barksdale, executed another deed of trust to Hearn & Co. on "all the interest of the party of the first part" in the land described in the former deed of trust. On March 15, 1898, the deed of trust executed by Mrs. Barksdale to Hearn & Co. was foreclosed and the land bought in by H. C. Barksdale for the sum of four thousand, nine hundred and fifty dollars. The deed executed to him by the trustee pursuant to this sale acknowledged payment of this sum, but it appears from the

evidence that no money was in fact paid by Barksdale, but that the amount of his bid was credited by Hearn & Co. on the notes given by Mr. and Mrs. Barksdale, and Barksdale then executed to them a new note for the sum of five thousand, five hundred dollars securing the payment thereof by a deed of trust on the land duly executed and recorded. On April 25, 1898, Barksdale executed a second deed of trust on the land to Hearn & Co. securing the payment to them of the sum of five thousand, five hundred dollars to correct an error in the first deed of trust executed by him. In the preambles of both of these deeds of trust after the name of the grantor, H. C. Barksdale, appears in parenthesis the word "widower." Barksdale seems to have been living on the land at the time of his wife's death, but some time thereafter and prior to the year 1900 he removed therefrom, and did not thereafter live thereon. His son, appellant, resided with him. On January 1, 1900, H. C. Barksdale sold the land to R. D. Herron by warranty deed for the sum of eight thousand, six hundred thirty-two dollars, the receipt thereof being acknowledged in the deed, and with which the notes due by Barksdale to Hearn & Co. were paid and Hearn's deed of trust satisfied. At the time Herron made this purchase he saw the deed of trust given by Mrs. Barksdale and her husband to Hearn & Co., but made no inquiry into the state of the title to the land. He did not know until some time after his purchase of the land that Maggie S. and H. C. Barksdale were husband and wife, nor that Mrs. Barksdale was dead and had left a son surviving her. The only notice he had as to the state of the title was that with which he was charged by the recorded deeds and deeds of trust dealing therewith. Herron immediately went into possession of the land and continued in possession thereof until he sold the same to appellees Learnard and Walker. On December 3, 1906, Herron sold forty acres of the land to Fred and Felix Walker for a cash consideration of one thou-

sand, two hundred dollars; the Walkers on the same day executing to him a deed of trust to secure the payment of three notes aggregating the sum of one thousand, three hundred fifty-seven dollars and sixty-eight cents, which deed of trust, so far as the record discloses, has never been satisfied. One of the Walkers afterwards executed a deed of trust to the First National Bank of Aberdeen to secure the payment to it of an indebtedness due it by Walker, which deed of trust is still in full force and effect. On December 3, 1906, Herron executed a deed of trust on the land, excepting that sold to the Walkers, to W. A. Kirkpatrick to secure a note for six thousand dollars due him by Herron, which note and deed of trust securing it were by Kirkpatrick assigned in July, 1910, to G. B. Gehlert. On August 23, 1910, Herron sold the land, excepting that previously sold by him to the Walkers, by deed duly executed and recorded, to J. P. Learnard, the consideration therefor being seven thousand dollars in cash, the assumption by Learnard of six thousand dollars due by Herron to Gehlert, and four notes executed to Herron by Learnard for one thousand, seven hundred fifty dollars each, due respectively July 22, 1911, 1912, 1913, and 1914. All of these notes except the last had been paid by Learnard when the bill in this case was filed. Learnard died on April 30, 1913, and by last will and testament devised the land to his widow and two children, Robert and Josephine. H. C. Barksdale, appellant's father died in December, 1906; and appellant became twenty-one years of age on August 9, 1910. As the decision of the cause does not turn upon any knowledge which appellant may or may not have had of his rights in the premises prior to the filing of his bill, a statement of his claim and of the evidence relative thereto is not here material.

The parties defendant to the bill are Herron, Mrs. Learnard, her children, the Walkers, and the parties now holding deeds of trust on the land. The prayer of the

bill is for a partition of the land and for an accounting to appellant by the Learnards and Walkers for the rents and profits thereof and for appropriate relief with reference to the incumbrances thereon.

One of appellees' defenses to the bill is that they are all *bona fide* purchasers and incumbrancers of the land, as the case may be, for value without notice of appellant's claim to an interest therein.

Appellant denies that appellees are purchasers and incumbrancers of the land for value without notice of his claim thereto, and contends that, conceding this to be true, such defense is not available against him, because: First, the purchaser for value without notice defense is available only against the holder of a secret equity, and that his interest in the land is legal, and not equitable, for the reason that the purchase thereof by his cotenant at the trustee's sale inured to his benefit; and, second, he was an infant at the time the various deeds and deeds of trust set up by appellees were given.

The court below held that "Herron bought said land with notice of complainant's interest therein," that the Walkers "paid a valuable consideration therefor without notice of complainant's claim," that Learnard purchased from Herron without notice of complainant's interest in the land, and that his widow and children are entitled to the protection accorded a *bona fide* purchaser without notice, except as to the note and interest thereon executed by Learnard to Herron remaining unpaid at the time appellant's bill was filed, and that Gehlert, Kirkpatrick's assignee, and the First National Bank of Aberdeen were innocent incumbrancers for value without notice of appellant's claim and decreed that the only relief to which appellant was entitled was to receive from the Learnards the money due on J. P. Learnard's unpaid note to Herron. From this decree there is a direct appeal by H. Clay Barksdale, complainant in the court below, and a cross-appeal by Herron.

Counsel for appellant do not claim that Herron had any actual knowledge of appellant's interest in the land, but that he must be charged with constructive notice thereof for the reason that, in the language of counsel's brief:

“(a) The lands were deeded by W. B. Brock and husband, S. M. Brock, in May, 1892, to T. W. Spruill. The next conveyance is from Jno. B. Spruill and Sarah E. Spruill to Maggie S. Barksdale. The title stood in T. W. Spruill. Why were Jno. B. Spruill and Sarah E. Spruill making a deed to it? What interest had they in the land? That is the human and natural inquiry. An investigation would have shown that they were heirs of T. W. Spruill and would have revealed that Maggie S. Barksdale was an heir also, Jno. B. Spruill, son, Sarah E. Spruill, wife, and Maggie Spruill Barksdale, daughter, being the only heirs of T. W. Spruill. T. W. Spruill owned the land on the record. A mere inquiry as to why he did not sign the deed (the most natural inquiry to make) would have disclosed that he was dead and explained why John E. Spruill, and Sarah E. Spruill signed the deed as his heirs, and that Maggie S. Barksdale was the only heir, she not joining as grantor because she was grantee. Sufficient in this, it seems, to give any prudent purchaser notice.”

In passing we will say that Herron was, of course, charged with notice that the land was owned by Mrs. Barksdale at the time of the execution of the deed of trust by her and her husband to Hearn & Co. Taking up again the language of counsel:

“(b) The next record after the property was deeded to Mrs. Barksdale is the deed of trust signed by Maggie S. Barksdale and H. C. Barksdale to McClellan, trustee, dated January 16, 1893. The title was in Mrs. Barksdale. Why was H. C. Barksdale signing unless he was the husband, and this land was a homestead?

“(c) The deed of trust provides for one thousand, five hundred dollars advancements, which would indi-

cate that this land was being occupied and used by the grantors.

“(d) Again H. C. Barksdale, on January 1, 1894, not quite a year later, signed a deed of trust on the same land to A. M. Chandler, trustee, for Hearn & Co. Barksdale had no title to the land. Why did he sign the deed of trust alone? A mere inquiry would have revealed that Mrs. Barksdale was dead, and then the natural inquiry would be, Who were her heirs?

“(e) Also in this same deed of trust made in January after the death of Mrs. Barksdale in October conveyed ‘all the interest of the party of the first part in the following land.’ The joint deed of trust had no such provision. Why this restriction? To answer the question reveals that the grantor had only half interest, and his son, the complainant, the other.

“(f) Next is the deed from McClellan, trustee, to Barksdale, dated March 15, 1898, under the sale of the property under the joint deed of trust—a joint tenant purchasing the property. The same day Barksdale gave the deed of trust to Roane, trustee, for Hearn for five thousand, five hundred dollars, showing any prudent purchaser this was merely a paper transaction—an effort to get the legal title out of Mrs. Barksdale. into Mr. Barksdale.

“(g) But in this very deed of trust given by Barksdale the very day he bought the property at the foreclosure sale under all of these suggestive facts we find Barksdale describing himself as a ‘widower.’ Surely this was sufficient to excite inquiry and give notice that Mrs. Barksdale was dead.

“(h) And again in the deed of trust made by Barksdale to Roane, trustee, for Hearn & Co., a short time afterwards, dated April 25, 1898, for five thousand, five hundred dollars, very likely made to correct error in the deed of trust of March 15, 1898, Barksdale is described as a ‘widower.’ ”

The two deeds of trust executed by Barksdale to Hearn & Co. referred to by counsel for appellant in paragraphs (d), (e), (f), (g), and (h) do not appear in Herron's chain of title; consequently he is not charged, in this connection, with constructive notice of the recitals therein. 23 Amer. & Eng. Encl. of Law (2d Ed.), p. 510.

That Herron had actual knowledge of the deed of trust from Mrs. Barksdale to Hearn & Co., to which fact reference is also made by counsel, imposed upon him no duty of inquiring into the state of the title other than that with which he was charged by reason of the deed of trust being of record.

The other matters referred to by counsel are not, in our judgment, sufficient to have put Herron upon inquiry. We must hold, therefore, that he was a purchaser for value without notice of appellant's claim to an interest in the land.

Assuming for the sake of the argument that appellant's contention that a *bona fide* purchaser for value without notice is protected only against the holder of a secret equity, nevertheless Herron acquired a perfect title to the land because of his purchase from Barksdale. Where one cotenant purchases an outstanding superior title to the common property, he acquires thereby the legal title to the whole of it, but holds such title in trust for the benefit of those of his cotenants who may wish to avail themselves of it by contributing or offering to contribute their proportion of the purchase money. Freeman on Cotenancy (2d Ed.), secs. 154—156; *Smith v. McWhorter*, 74 Miss. 400, 20 So. 870; *Dickerson v. Weeks*, 106 Miss. 804, 64 So. 731. Which right, as between him and his cotenants, will not be barred by mere lapse of time, but only when the delay to assert it is accompanied by circumstances which give rise to an estoppel. *Dickerson v. Weeks*, *supra*; *Watson v. Vinson*, 108 Miss. 600, 67 So. 61. Herron, therefore, by his purchase from Barksdale,

acquired the legal title to the land, and since he was without notice, actual or constructive, that it was held by Barksdale in trust for the benefit of appellant, he acquired it discharged of such trust. *Clark v. Rainey*, 72 Miss. 151, 16 So. 499; *Atkinson v. Greaves*, 70 Miss. 42, 11 So. 688; *Conn. v. Boutwell*, 101 Miss. 353, 58 So. 105; 1 Perry on Trusts (6th Ed.), sec. 218.

Dickerson v. Weeks and *Watson v. Vinson*, *supra*, are not in conflict herewith; for the *bona fide* purchaser for value without notice rule was not involved in either of those cases. In *Dickerson v. Weeks* the purchaser of the legal title from the cotenant who purchased an outstanding superior title to the common property had actual knowledge at the time of his purchase of the rights of the other cotenants. In *Watson v. Vinson*, an examination of the original record and briefs of counsel will disclose that the subsequent incumbrancers defended not on the ground that they were without notice that Watson held the legal title to the land in trust for his cotenants, but on the ground that the right of these cotenants to avail themselves of Watson's purchase was barred because they had delayed doing so for an unreasonable length of time.

That appellant was an infant at the time the land was purchased by his cotenant at the trustee's sale is immaterial, for the reason that:

"Infants holding an equity in land, when the legal title thereto is acquired by an innocent purchaser, are in no better condition than they would have been if they were adults." 22 Cyc. 528; *Conn v. Boutwell*, 101 Miss. 359, 58 So. 105; *Clark v. Rainey*, 72 Miss. 151, 16 So. 499.

Since Herron purchased the land for value without notice of appellant's claim to an interest therein, he acquired the complete *jus disponendi* thereof; consequently the question of notice *vel non* by Herron's vendees and the persons to whom he and they have executed deeds of trust of appellant's claim is immaterial,

and in stating the case we have omitted the facts and agreement of counsel relative thereto. 2 Pom. (3d Ed.), sec. 754; *Atkinson v. Greaves*, 70 Miss. 42, 11 So. 688.

The decree of the court below is affirmed on the direct appeal, but on the cross-appeal is reversed, and the bill dismissed.

Reversed on cross-appeal, and dismissed.

SMITH, TAX COLLECTOR v. PERKINS.

[73 South. 797, Division B.]

LICENSES. Tax on undertakers. "Undertaker." Statutes.

Under Laws 1916, chapter 90, requiring each dealer in coffins, if an undertaker, to pay one hundred dollars for a privilege license but providing that a merchant carrying coffins in stock and paying a privilege license on the stock shall pay a tax of five dollars in addition to the tax required of him as a merchant; where a merchant carries a stock of coffins in addition to his other stock and takes charge of dead bodies and prepares them for burial and does all things necessary to constitute him an undertaker, he is liable to the tax of one hundred dollars without reference to whether he sells merchandise or not.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by W. Ed. Smith, tax collector of Lincoln county, against C. B. Perkins. From a judgment for defendant, plaintiff appeals.

Chapter 90 of the Laws of 1916, requires the payment of a privilege license by "each dealer in coffins . . . in all cities, if dealer be an undertaker, one hundred dollars. If any dealer in coffins . . . is an embalmer, or employs an embalmer in connection with his business, in that event, he shall pay an additional tax of ten dollars. None of the foregoing pro-

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visions shall apply to a merchant who carries coffins in stock and pays a privilege tax on the stock. But such merchant who carries coffins in stock and pays a privilege on the stock shall pay a tax of five dollars in addition to the tax required of him as a merchant."

Geo. H. Ethridge, Assistant Attorney-General, for appellant.

H. Cassedy and *Luther L. Tyler*, for appellee.

Cook, P. J., delivered the opinion of the court.

The facts in this case as shown by the declaration are that the appellee is a merchant in the city of Brookhaven, engaged in the general hardware business, and in addition to his hardware business he is engaged in a general coffin business, and carries a stock of coffins for sale. He is also engaged in the undertaking business, in that he takes charge of dead bodies, prepares them for burial, and does all things necessary to constitute him an undertaker under the law. He is also engaged in the embalming business, and does all things necessary to make him an embalmer under the law.

The appellant is sheriff and tax collector of Lincoln county, and as a part of his official duty he is required to collect taxes for privilege license. The city of Brookhaven having a population of more than three thousand, the sheriff and tax collector, the appellant in this case, demanded the sum of one hundred dollars privilege license, as provided for in chapter 90 (Senate Bill No. 174) pp. 79 and 80, of the Laws of 1916, and the appellee refused to pay the amount demanded.

Appellant then filed a declaration against the appellee for the sum of two hundred dollars the appellee having refused to pay the privilege tax as demanded before the 1st day of June, 1916, and continuing to refuse to pay it after that date. The tax therefore,

according to appellant's contention and his construction of the law, is doubled. The declaration shows all of the facts.

The amount involved being two hundred dollars, the suit was begun in the justice court. It was there decided against appellant, and he appealed to the circuit court. In the circuit court a demurrer was interposed by the appellee, was sustained by the circuit court, and appellant's declaration dismissed. Thereupon appellant appeals this cause to the supreme court for decision.

It will be noted that appellee is a merchant and carried coffins in stock, and has paid his privilege tax as a merchant and has also paid five dollars in addition to the tax required of him as a merchant. He refuses to pay the one hundred dollars the statute assesses against undertakers, because he contends the statute exempts merchants from paying the undertaker's privilege tax, when the merchant pays the five dollars additional required of him as a merchant.

The business of an undertaker is a distinct business or profession. The undertaker takes charge of the corpse, prepares it for burial, and attends to its interment. If a merchant dealing in coffins as part of his stock may escape the undertaker's tax, it is easy to see that all undertakers could escape by supplying themselves with an insignificant stock of goods.

It is difficult to imagine that the legislature intended to thus favor a selected class of merchants. If this is a proper construction of the statute, we find that an undertaker with a stock of coffins worth five hundred dollars would have to pay one hundred dollars, while a merchant with a stock of coffins worth one thousand dollars would get off with his undertaker's business by the payment of five dollars.

We are unable to attribute this sort of discrimination to the lawmakers. To make this statute a valid exercise of the legislative power a different construc-

tion must be found, if it can be reasonably done. We believe that it was the intention of the legislature to require the payment of one hundred dollars by all undertakers, without reference to whether the undertaker also sells merchandise or not.

It is generally understood that the undertaker's business is necessarily very profitable. The bereaved relatives of the deceased cannot haggle about prices, and the undertaker's profits are only limited by his conscience, and no sane person can imagine that an undertaker's conscience would be satisfied by the accumulation of a stock of merchandise.

Reversed and remanded.

PIGOTT v. PIGOTT ET AL.

[73 South. 800, Division A.]

1. ESTOPPEL. *By pleading. Nature of title asserted.*

Where a complainant alleged in a bill not sworn to that he claimed land under a gift from his father, and claimed title exclusive of every one else except his co-plaintiffs, he was not estopped in another suit for the land to dispute that he was a tenant in common with his brother and sister, who were not co-plaintiffs in the first suit.

2. EVIDENCE. *Pleadings. Unsworn pleadings as evidence.*

Admissions and declarations of facts contained in unsworn pleadings are not admissible as evidence against the party pleading, nor is he estopped by an expression of opinion therein as to his legal rights and liabilities.

3. PLEADINGS. *Admissions. Effect.*

Where one claiming land adversely was joined as a plaintiff in a bill by the true owner of the land, but in fact had nothing to do with the suit, and did not read the bill, or authorize the other party's attorney to make claim by the bill, except by adverse possession, he was in no way bound by allegations of the bill to a different effect.

APPEAL from the chancery court of Marion county.
HON. R. E. SHEEHY, Chancellor.

Suit by T. A. Pigott and others against W. A. Pigott. From a decree for complainants, defendant appeals.

The facts are fully stated in the opinion of the court.

Mounger & Ford and *Lamar Hemington*, for appellant.

Dale & Rawls and *Hall & Hall*, for appellees.

SYKES, J., delivered the opinion of the court.

The appellees filed a bill in the chancery court of Marion county, claiming title to an undivided eight-ninths interest in certain lands in possession of appellant, and praying that the claim of appellant to this entire tract of land be canceled as to the above interest, and that they, together with appellant, be declared to be tenants in common of this land. The answer denied all interest of appellees in the land, and denied that the relation of tenants in common ever existed between appellant and appellees as to this land. On final hearing on bill, answer, and proof, a decree was rendered in favor of the appellees, from which decree this appeal is prosecuted.

The material facts in the controversy are as follows, viz: The land in controversy belonged to the state of Mississippi until the year 1883. However, in 1875 and 1877 John Pigott, the father of all the parties to this litigation, purchased the same at a tax collector's sale for unpaid taxes. The land at that time was not subject to taxation; consequently both sales were absolutely void. The wife of John Pigott (Lucy Pigott) owned contiguous lands to those in controversy. Through mistake, John Pigott, acting for his wife, fenced in at different points some small tracts, consisting of a few acres, of the land in controversy,

with hers, and put the same in cultivation. John Pigott at various times cut cordwood and board trees, and also some trees for making fence rails, off this land. The testimony also shows that he cut trees for the same purposes off of other lands, which belonged either to the state or to nonresident owners. There was some proof, also, which is very vague and indefinite, that John Pigott had once claimed to own all the lands in controversy. The testimony of the same witness, however, is to the effect that at the same time John Pigott made a statement in which he said some Northern people were also claiming to own the land. John Pigott never paid any taxes on the land during his lifetime. He died in 1891. At that time he actually owned forty acres of land, and his wife, Lucy Pigott, who survived him, was the owner of about two hundred and forty acres. They had eight children. The testimony shows that, as each son became of age, John Pigott gave him one hundred and sixty acres of land. Before his death he had thus provided for all of his sons, except the youngest, Theodore. He left no will, but before his death he administered upon his own estate, and also that of his wife, and explained to all his children that he had provided for all of the boys except Theodore, and that at his (John Pigott's) death his wife and children must deed to Theodore the home place, consisting of the two hundred and forty acres. Theodore was to live at the home place and take care of his mother until her death. No provision was made at that time for a division of the personal property. At the time of his death the testimony shows that he was making no claim of ownership of the land here in controversy. Neither did he in any way attempt to divide this along with the other real estate. The testimony of his wife, who seems to know more about it than any one else, was to the effect that he had long since abandoned any claim whatever to this land. At the

time of his death none of his children knew anything about his claim to this land, neither did they make any claim to it. Theodore lived with his mother until 1893, at which time, after a family conference, it was decided that he should take the land belonging to W. A. Pigott, the appellant in this case, and that W. A. Pigott take that meant for Theodore. This intention was executed by the appellant's deeding to Theodore his one hundred and sixty acres of land, and by the other children and the mother all deeding to the appellant the land intended for Theodore. The appellant then went into possession of the land deeded to him, and shortly thereafter he began to attempt to exercise certain acts of ownership over the land in controversy.

In 1883 the state by patent sold these lands; and in 1907 the record title to same was held by some parties by the name of Cheeseboro. At this time these people began to investigate their ownership of the land, and found the appellant claiming to be the owner of it. The only testimony in the record about this claim of ownership is that of the appellant himself. He testified that he told the agent of the Cheeseboros that he claimed the land, because he had been in the adverse possession of same since 1893, or a period of fourteen years. A compromise was then entered into between the appellant and the Cheeseboros, a part of which was the filing of a friendly suit in chancery, in which the appellant and the Cheeseboros were complainants, and unknown claimants of the land were made defendants. This bill was not signed by the appellant. There was an allegation in the bill that John Pigott went into possession of the land, and occupied it for about fifteen years before his death, and that the appellant, W. A. Pigott, under gift of his father, continued in possession of the land until the filing of the bill, claiming it adversely and exclusively and against all persons. In the compromise with

the Cheeseboros the appellant deeded them the timber on certain lands, and they in turn deeded all of the land to him. It is claimed by the appellees that in making this compromise settlement with the Cheeseboros, who were nonresidents, W. A. Piggott used as an asset the void tax deeds to his father, and also claimed that his father had had possession of the land; that without this claim through his father he could not have made his settlement, and that this claim could only have been made as a tenant in common of the appellees, and that a constructive trust resulted therefrom, and that the settlement or compromise made by him was in law made for himself and these appellees as his tenants in common. From 1883 until 1907 the taxes on these lands were paid by the Cheeseboros and their immediate and remote vendors. After the compromise in 1907, and until the filing of this suit, the taxes on these lands were paid by the appellant. The appellant has also made valuable improvements on the lands in controversy. The uncontradicted testimony of the appellant is that he never read the bill filed in the above-mentioned suit until the present suit was brought; that he did not authorize the attorney of the Cheeseboros, who really filed the bill, to state in said bill that he made any claim to the land by virtue of any tax deeds, or claimed it in any way through his father; but, on the contrary, that he claimed on account of his adverse possession of same.

The appellee claims that the appellant in this case is bound by the allegations in the bill filed by him and the Cheeseboros, and that by the allegations in that bill he and these appellees are tenants in common. The appellees are mistaken in both of these contentions. Under the allegations of that bill, the appellant claimed under gift from his father, and claimed title exclusive of every one else except the Cheeseboros. He is in no way bound by those allegations, and no estoppel whatever arises therefrom. *Crumph v. Gerock*, 40 Miss.

765; *Co-operative Loan association v. Leflore*, 53 Miss. 1; *Meyer v. Blakemore*, 54 Miss. 570. The testimony in this case really shows that the Cheeseboros were the owners of the land at the time they made the compromise which vested the title in this appellant. In 1893, when the appellant took possession of the land deeded to him, the testimony in the case conclusively shows that all of the land owned both by the father and the mother of the parties litigant in this case had been divided. The testimony further shows that all claim to the land in controversy by either John Pigott or any of his family had long since been abandoned. There were no such acts of ownership ever exercised over this land by John Pigott as would have ripened into a good title by adverse possession. *McCaughn v. Young*, 85 Miss. 277, 37 So. 839; *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660.

The decree of the lower court is therefore reversed, and the bill dismissed.

Reversed and dismissed.

SMITH v. ST. LOUIS & S. F. R. Co. et al.

[73 South. 801, Division B.]

RELEASE. Promise of re-employment. Injuries to servant. Fraud.

Where a railroad engineer being injured, settled with the company for six thousand dollars, and executed a release one year after he received his injuries, which release he claimed was procured by the fraudulent misrepresentations of the company that it would employ him as engineer when he had fully recovered, such representations if made did not render the release void, but at most, only voidable and the engineer cannot disregard it and sue at law on his original cause of action without returning or offering to return the consideration paid him, it is only where the release is void that no tender is necessary.

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Statement of the case.

APPEAL from the circuit court of Lee county.

HON. CLAUDE CLAYTON, Judge.

Suit by G. M. Smith against the St. Louis & San Francisco Railroad Company and others. From a judgment for defendant on demurrer to the replication, plaintiff appeals.

The issue presented by this appeal arises upon the pleadings. Appellant at one time was a locomotive engineer employed by the St. Louis & San Francisco Railroad Company, one of the appellees herein, as one of its regular locomotive engineers, and while so employed he was run over and seriously and permanently injured by a switch engine at Amory, Miss. About one year after the accident appellant negotiated for and concluded a settlement with the railroad company, by the terms of which he accepted the sum of six thousand dollars cash, apparently in full settlement of all damages sustained by him, and as evidence of this settlement executed a full release to said railroad company. On November 7, 1914, a little more than three years after the accident, appellant brought this action for damages against appellee railroad company to recover fifty thousand dollars for the injuries alleged to have been inflicted by the negligence of the defendant. To the declaration so filed the defendant interposed the plea of general issue and special pleas of accord and satisfaction, or settlement, as reflected and evidenced by said release. The point argued here is raised on plaintiff's amended replication to the defendant's second special plea and the demurrer thereto. The court sustained the demurrer to the replication, and, plaintiff declining to plead further, judgment final was entered dismissing the cause and taxing appellant with the costs. The replication is in the words following:

"For replication to defendant's second special plea, plaintiff avers that said alleged contract of settlement, dated October 2, 1912, and said alleged release, dated

October 23, 1912, exhibited with said plea, are fraudulent and void, and have no binding force on this plaintiff, because they were entered into by the plaintiff and the said defendant the St. Louis & San Francisco Railroad Company, under the following conditions and circumstances:

"The true consideration of said alleged contract of settlement and release, was not the payment to the plaintiff alone of six thousand dollars by the said railroad company, but the large and more important consideration therefor was an agreement on the part of the said railroad company to re-employ the plaintiff as one of its locomotive engineers, the same position occupied by him at the time of his injury, such employment to begin when plaintiff had sufficiently recovered from such injuries, and to continue as to permanency under the same rules and regulations as existed prior to his said injury; and for the purpose of inducing and entrapping plaintiff (who was inexperienced in such matters, and unlearned in the law), into executing said alleged contract of settlement, including said release, the said railroad company designedly, falsely, and fraudulently represented to the plaintiff that it was not necessary to embody said contract of re-employment in said compromise settlement, and falsely and fraudulently promised plaintiff that if he would execute said papers he would be re-employed in his old position, under the same rules and regulations as to permanency as existed before his said injury, which promises and representations were false and fraudulent, and known to be such by said railroad company at the time they were made, and were made for the purpose of entrapping plaintiff into the execution of said compromise settlement, and the plaintiff, relying upon said false and fraudulent representations, executed said compromise papers, which would not have been done except for fraud.

"And the plaintiff avers that he did sufficiently recover to take back his old place of employment with the said defendants, and offered his services time and again, and continued to do so up to the time of the bringing of this suit, and in violation of said compromise settlement, as really intended and made on the part of the plaintiff, the said defendants refused plaintiff re-employment; and therefore plaintiff avers that said compromise settlement as executed and exhibited with said plea is without consideration, and was procured by fraud as aforesaid, and is null and void, all of which plaintiff is ready to verify."

The release in question bears date of October 3, 1912, is in due form and undertakes, for the consideration of six thousand dollars cash, fully to release and acquit appellee railroad company of all claims, demands, or causes of action arising from or growing out of any and all personal injuries therein stated to have been received by Mr. Smith at Amory, Miss., October 21, 1911.

W. D. & J. R. Anderson, for appellant.

The brief and argument on behalf of appellees is very largely based on the theory that the replication in question only avers fraud in the performance of the contract of settlement and not fraud in its procurement. We do not see how fraud in the procurement of a contract could be more plainly set out than is done in this replication. The replication charges what the fraudulent statement consisted of; that the statement was never made with the intention of being performed but for the purpose of leading the appellant into the very trap he got into. The fact that a considerable sum was paid the appellant has nothing to do with the principle involved in this case.

We submit that in view of the averments of the replication in question there is no force in the conten-

tion of counsel that this contract which was fraudulent in its inception was afterwards ratified by the appellant by his delay in bringing suit and his failure to tender back the amount of money paid him by virtue of the alleged fraudulent accord and satisfaction. The replication avers that the main consideration for the accord and satisfaction was the promise of the reemployment of the appellant when he was able to take his place back; that this promise was fraudulently made; that the railroad never intended to carry out said contract and that when the appellant had sufficiently recovered to take his job back instead of ratifying the contract as written by delay, he repudiated it by continually offering his service as an engineer to the railroad company. That the part of the replication covering this feature of the question is in this language.

“And the plaintiff avers that he did sufficiently recover to take back his old place of employment with said defendants and offered his services time and again and continued to do so up to the time of the bringing of this suit; and in violation of said compromise settlement as really intended and made on the part of plaintiff, said defendants refused plaintiff reemployment, and therefore plaintiff avers that said alleged compromise settlement as executed and exhibited with said plea is without consideration and was procured by fraud as aforesaid and is null and void.”

Under the decisions of the supreme court of this state it is settled that the appellant was not required to tender back the amount paid him as the result of the alleged accord and satisfaction. He had the right to retain this as a part indemnity for the injury he had received. Now what more could he have done in order to disaffirm the contract as written than he did do. He repudiated the contract as written. The delay he persistently and continually (after he sufficiently recovered) tendered his services to the railroad com-

pany in accordance with the contract as intended. We submit that the appellant could have gone on in this attitude without bringing suit for any length of time short of the period limited by the statute of limitations. The principle we contend for in this case is recognized by several of the leading authorities cited by opposing counsel in his brief. We shall now quote from some of these authorities. In the case of *Laird v. Union Traction Co.*, 57 Atl. 987, the court said:

"Besides, there being no fraud in obtaining the release, the plaintiff ratified it by using the money weeks after with full knowledge of where it came from and made an offer to return it before bringing suit."

We ask, suppose there had been fraud practiced in obtaining the releases, would there have been a ratification by the delay? In *Chicago, St. Paul & K. C. Ry. Co. v. Pierce*, 64 Fed. 293, the court said in part: "Plaintiff was a person in the prime of life. The contract was a valid and binding contract, provided there was no fraud and she had the mental capacity at the time to make it."

In *Gibson v. Wnyp. Ry. Co.*, 30 Atl. 308, the court said: "It was his duty, when he first learned of the existence of the release, to disallow it, and at least, before suit was brought, return or offer to return the money received under it, for it is not pretended any fraud was practiced upon him in obtaining the release. In its worst aspect that was executed when those acting for the company were wholly ignorant of the incapacity which is now alleged to have existed. When there is a disaffirmance of the contract caused by fraud, the injured party may, in some cases, bring his action without repaying or offering to repay the money received on the fraudulent contract. In such cases the money is retained, not as part of the consideration of the contract he denies, but as indemnity for the fraud perpetrated upon him. As he was deceived by falsehood or fraud there is no admission that it was a con-

sideration for the contract, and there is consequently no obligation on him to return it.”

We submit that this is the very case made by the replication here in question. *Pawnee Coal Co. v. Royce*, 56 N. E. 621; *Babcock v. Farwell*, 245 Ill. 14, p. 40; *St. Louis & San Francisco R. R. Co. v. McCrory* (Ala.), 56 So. 82.

We submit that the principle announced in this case covers the case in hand. However in Alabama the rule is different from that in Mississippi as to the necessity of returning or offering to return the consideration of the settlement before suit is brought.

J. W. Canada, for appellees.

Learned opposing counsel have confused the difference between fraud going to the execution of a contract, and fraud going to the procurement, inducement, or consideration. Fraud which goes to the procurement, inducement, or consideration, renders it voidable only. Where one of the parties is *non compos mentis*, from shock, injury, drugs, anesthetics, fright, or other causes and while in that condition a release is secured, and an alleged settlement made such a release or settlement is absolute void, for the reason that the party signing it did not possess the capacity to contract, and no contract ever came into being, therefore.

As stated in *Railway v. Lewis*, 109 Ill. 120, at page 131: “If the release was obtained by fraud at a time when plaintiff was incapacitated to contract, it was absolutely void from the beginning.”

Or, where a party sign a settlement in full, upon the representation and with the belief that it is simply a receipt for expense money, and medical expenses, the relapse is absolutely void, because the party did not consciously sign a full release. So there never was a contract. There never was a meeting of the minds. The first essential of a contract was wanting. It was, therefore, absolutely void.

But where the party knows the nature and character of the paper he is signing—is possessed of all of his faculties—howsoever false and fraudulent the representations contained therein may be, the contract is voidable only. The party injured may rescind by a return of the fruits thereof.

In *Laird v. Union Traction Co.*, 7 Atl. 987, it was claimed that: “the plaintiff was prostrated and unconscious from his injury, and, therefore, was incapable of executing a valid release.” (p. 987). The court found to the contrary, but implied that if such was the fact there had been a ratification.

In *C. St. Paul, et al. v. Pierce*, 64 Fed. 293, quoted by opposing counsel, the plaintiff contended that: “At the time of the execution of the release she was suffering from great agony of body and mind to such an extent that she was wholly deprived of her reasoning powers, and in condition which rendered her unfit and incapable of contracting, etc.” (p. 294).

And then the court later added: “But allowing that she had not such capacity, as the jury must have found, still, after she had recovered her health and usual mental condition so as to render her capable of comprehending the settlement, she was bound either to affirm or disaffirm, etc.” (p. 296).

So that case is authority of the proposition that even an absolutely void release could be ratified.

In the case of *Gibson v. Railway Co.*, 30 Atl. p. 308, also quoted by opposing counsel the court said (p. 310): “There is, however, the positive oath of the plaintiff that, from the effects of the anesthetic his intellectual faculties were in a state of paralysis, so complete that he had no knowledge of the contents of the paper or that he was signing any instrument whatever. If this were the fact then it could not bar his recovery any more than if it had no existence.” It is that kind of fraud the court was speaking of.

In the case of *Pawnee Coal Co. v. Royce*, 56 N. E. 621, immediately following the first paragraph of the quotation cited by opposing counsel, the court quoting with approval from *Railway v. Lewis*, 109 Ill. p. 131, said: "If the release was obtained by fraud at a time when plaintiff was incapacitated to contract, it was absolutely void from the beginning, as between the parties, and will stand in the way of the assertion of no right by the party defrauded."

In other words, it was that sort of fraud (fraud going to the execution of the contract) that the court referred to as fraud that would obviate a return of the money.

And in the case of *Babcock v. Farwell*, 245 Ill. 10, immediately following the paragraph quoted by opposing counsel, the court said: "The doctrine (that the money need not be refunded in case of fraud going to the execution of the release) has no application to a case where there was fraud only in the consideration, as where the party knew that he was executing a release, but was induced to do so by the false representations of the other party as to matters other than the character of the instrument. In this latter case the release so obtained is not void, but voidable only."

This case makes quite clear the difference between fraud going to the execution of a contract, which renders it void, and fraud going to the consideration, inducement, or procurement, which renders it voidable only.

In the case of *Railroad v. McCrory*, 56 So. 822, immediately following the paragraph quoted by opposing counsel, the court added: "He who rescinds a contract for fraud must make speedy restitution to the party by whom he was defrauded of anything received by him under the contract, as it is the duty of the party seeking a rescission to put his adversary in the same position, as far as possible, that he occupied when

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the contract was made. He cannot hold to the fruits of a contract with the other." (p. 824).

This is exactly what the plaintiff seeks to do in this case.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). This case has been well argued and briefed, and the conclusions we have reached from a consideration of the legal questions presented lead to an affirmance of the judgment entered by the trial court. The pleadings show that appellant does not deny, but, on the contrary, affirms, the existence of the written release. This contract of settlement was entered into about one year after the injury complained of, bears the signature of appellant, and is conceded to be the contract, at least so far as it goes. As we understand the argument of counsel for appellant, the position is taken that, because of the averments of the replication that Mr. Smith was induced to sign the contract of settlement by verbal representations of appellees' agents to the effect that Mr. Smith would be re-employed as an engineer whenever he became physically able to resume his job, and because, further, Smith had now become able to work, and appellee had declined to give him back his job, and because these verbal representations about re-employment are charged to have been wilfully and knowingly false at the time they were made, Mr. Smith as a party to this written contract, has a right now to ignore the full release and acquittance executed by him and to sue on the original cause of action. As stated, appellant does not deny his signature to the instrument, does not aver that the contract expressly contains stipulations not agreed to, does not charge any misrecitals of fact in the document, but concedes the correctness of the recitals so far as they go. He does not charge that this contract was signed at a time when he

was suffering from pain or when his mental faculties were weakened or impaired or his brain befuddled by opiates. The case is entirely different from those cases relied upon by appellant and holding that under some circumstances the injured party has a right to ignore the contract, retain the fruits of the settlement, and sue on the original cause of action. It is certainly different from the case of *Jones v. A. & V. R. R. Co.*, 72 Miss. 22, 16 So. 379; *St. Louis & S. F. R. Co. v. Ault*, 101 Miss. 341, 58 So. 102; *K. C. M. & B. Ry. Co. v. Chiles*, 86 Miss. 361, 38 So. 498. In each of the cases mentioned there was the element of "indecent haste," undue influence, and oppression. There was evidence in those cases tending to prove and fully warranting the jury in finding that the minds of the parties had not met and that there was no binding contract at all. The hand of fraud had written the plaintiff's signature to the so-called release. When the plaintiff in each case "came to himself," he realized that all his physical injuries, sufferings, and impaired efficiency caused by the negligence of the railroad company had been apparently sold by him for a mess of pottage. The signature of the injured party, so hastily and improvidently attached to the written release, confronted the plaintiff, but the document so signed and executed did not speak the deliberate agreement of a healthy mind. The so-called release, in the judgment of our court, was no contract at all. There was no tender of the small pittance received by the plaintiff in those cases as the fruits of the settlement and no tender was necessary. But in each case the contract was absolutely void. As reaffirmed by our court in the *Ault Case*, *supra*. "If the release was void, no tender was necessary." Therein lies the difference between those cases and the instant case. The release in the present case is not void. It may be voidable in a court of equity, but no issue seeking cancellation on the ground of fraud or of mistake is here presented. The plaintiff in this case

has instituted action upon the original cause of action and ignored the release. He has not tendered back the fruits of the settlement, and does not offer to do so. The amount of the settlement in this case is not insignificant, but is the substantial sum of six thousand dollars. The chief injuries sustained by Mr. Smith was the loss of a foot and serious injury to the other. He yet has some earning capacity, as evidenced by his offer to return to appellee's employment. For all this court may know the jury in assessing damages for the injuries inflicted might not award the plaintiff the full sum of six thousand dollars. The settlement was entered into deliberately, and no fiduciary relationship existed between appellant and those with whom he was negotiating. He had full opportunity in the year's time in which to reflect over the extent of his injuries and to figure the amount he should claim. In doing so he had full opportunity to consult or advise with his friends and the best of legal talent. He does not even complain of the misrepresentation of an existing fact at the time the settlement was entered into, but relies upon a collateral, contemporaneous oral agreement about re-employment in the future. This, in our judgment, is not sufficient to render the contract void, and to so hold would render nugatory the many written contracts of settlement deliberately and in good faith entered into by the injured with railroad companies and others whose negligence is brought in question. Such holding would obstruct the way to peaceful settlements and encourage litigation. Instead of returning or offering to return the fruits of the settlement in this case, appellant has kept and used the money and apparently ratified the contract. If authority is necessary in support of the position we here take, the cases are abundantly collated in the brief of appellees.

Affirmed.

ROBERTSON, STATE REVENUE AGENT v. PUFFER MFG. Co.

[73 South. 804, Division B.]

1. COURTS. *Rules of property. Contract. Construction.*

When the supreme court has construed a contract as a lease and not a conditional sale and one of the parties to the action afterwards made a similar contract, the decision became a rule of property binding on such party,

2. TAXATION. *Liability of holder of legal title. Personal property.*

The lessor of a soda fountain, being the holder of the legal title thereof, is liable for the personalty tax thereon.

3. TAXATION. *Personal liability. Owner. Contract to assume. Effect.*

When the taxing board discovers the owner of the legal title, its duties are performed when it assesses the property to such owner, without regard to the equities which may exist between the owner and his lessee.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Suit between S. V. Robertson, State Revenue Agent, and the Puffer Manufacturing Company. From an adverse judgment, the revenue agent appeals.

The state revenue agent caused certain soda fountains located in Hinds county, Miss., to be assessed for back taxes for a term of years. The notice given by the revenue agent to the assessor directed him to assess said property to the Puffer Manufacturing Company as the owner. The property assessed was held by the McIntyre Drug Company under a contract hereinafter set out, and it was claimed by the appellee that the contract is a conditional sale, and that the property really belongs to the McIntyre Drug Company, and that taxes should be assessed against that company as the owner. It is admitted that no taxes for the years claimed have been paid by any one on this property. The case was submitted to the circuit judge on an agreed state-

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ment of facts, and from an adverse decision the revenue agent appeals. The contract executed by the Puffer Manufacturing Company and the McIntyre Drug Company is as follows:

“Lease.

“The Puffer Manufacturing Company, Manufacturers of Soda and Mineral Water Apparatus, Extracts, and Supplies.

“Boston, Mass., Oct. 1, 1908.

“Known all men by these presents that McIntyre Drug Company, 343-345 W. Capitol street, of Jackson, state of Mississippi have hired, leased, and received of the Puffer Manufacturing Company, a corporation duly authorized by law and having its usual place of business in the city of Boston in the county of Suffolk, commonwealth of Massachusetts, for the term, to wit, four years four and three-thirtieth months, ending February 5, 1913, subject to the conditions herein stated, the following described goods and chattels: One Constellation soda and mineral water draft apparatus No. 513 and appurtenances fully described or manufactured by the said Puffer Manufacturing Company, and numbered as above. And we do promise and agree with the said Puffer Manufacturing Company, its representatives and assigns, to pay it, or them, for the possession and reasonable use thereof, for said term, the sum of four thousand eight hundred dollars as rent, to be paid in the installments set forth in the several obligations given by us therefor as follows: Cash five hundred dollars balance at the rate of ninety dollars a month from March 5, 1909, to January 5, 1913, and seventy dollars February 5, 1913; total four thousand, eight hundred dollars—with interest from date hereof at the rate of six per cent. per annum. And we agree this day to insure the said goods and chattels against fire and cyclones in a sum not less than four thousand three hundred dollars, in the name of said Puffer Manufacturing Company, as

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owners, and for the benefit of the said Puffer Manufacturing Company, and the said McIntyre Drug Company. And in the event of failure to so insure and deliver policy to said Puffer Manufacturing Company within thirty days from the date hereof, the said Puffer Manufacturing Company may so insure said goods and chattels, and any premium paid for such insurance by said Puffer Manufacturing Company shall be an obligation which must be paid by the lessee in addition to the above-mentioned obligations. And it is provided, that the lessee will pay all taxes assessed on this property. And we further agree that if the whole or any part of the money due by virtue of any of the provisions hereof, whether evidenced by any of said obligations or otherwise due according to any of the terms and provisions of this instrument, or by reason of any breach of said terms or provisions, be not paid when due, and if an attorney be employed for the collection of same, or if any sum so due be collected by an attorney or by legal proceedings of any kind, an attorney's fee of ten per cent. of the amount due, in addition to all costs and expenses incident to such collection, shall be added to the amount so due, and shall become an obligation of like force and effect with the obligations above referred to.

"And it is provided that said property hereby leased is not to be removed from the premises where now located, No. 343-435 W. Cap. street, in said Jackson, Miss., nor in the interest of the lessee under the lease to be transferred without the consent of the said Puffer Manufacturing Company in writing there-to first obtained.

"And it is further provided that upon full payment of the several obligations aforesaid all claims and title to said property on part of the said Puffer Manufacturing Company shall cease, and the whole title shall vest in said lessee as owner. But upon any breach of the

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provisions of this lease, especially upon failure by the said lessee to pay said obligations, or either of them, as they become due and payable, then all of the said several obligations shall mature and become due immediately, and, at the option of the lessor, this lease and any and all claim or right on the part of the lessee under the same, or to the further use, or to the further use or possession of said property, shall be thereby terminated, and the said Puffer Manufacturing Company, or its representative, may thereafter at any time enter the premises where the said property may be and resume possession of the same without any process of law or let or hindrance from the lessee, and such of the aforesaid obligations as but for said default would have matured after said Puffer Manufacturing Company have resumed possession of said property shall be taken and held to be void, and returned to the lessee upon demand, but the obligations which became due and were unpaid prior to said default shall remain in full force and effect. And it is mutually understood by both parties to the lease that said lessees have not the option of terminating this lease at their pleasure, but shall retain the said goods and chattels for the length of time specified, and pay all the said obligations as they mature.

“Said obligations are not to be taken as a payment for said goods and chattels under any law in any state, but only as evidence of the amount to be paid in order that the lessee may become owner of the property.

“Witness our hand and seal this 10th day of October, 1908.

“[Signed] McIntyre Drug Co.,

“By C. A. McINTYRE. [L. S.]”

Jas. R. McDowell and Fred M. West, for appellant.

W. Calvin Wells, for appellee.

COOK, P. J., delivered the opinion of the court.

This is a suit between the revenue agent and appellee to ascertain to whom should be assessed taxes on a soda water fountain, and from a judgment for appellee, appellant appeals to this court.

The document construed in *Puffer Mfg. Co. v. Dearman*, 97 Miss. 622, 54 So. 310, is essentially the same as the document to be construed in the present case. There is a slight difference, but it does not affect the question involved. The Dearman Case must be overruled to affirm the judgment of the circuit court. It seems to be assumed that the Dearman Case is manifestly wrong, but the reasoning employed to reach that conclusion is far from convincing.

But suppose we assume that the assumption is sound; that the document so laboriously and ingeniously prepared to create a lease is, at least, nothing more than a conditional sale. Does it necessarily follow that we should now label it a conditional sale? Mind you, when the parties entered into this contract they intended it to be construed as a lease because they were actually advised by the highest authority of this state that the contract was a lease. Must we change contracts overnight that have already been interpreted by the court of last resort, or must we stand by the decision formerly rendered, and thus preserve the contractual rights of the parties?

By the terms of this contract the lessee is obligated to pay the taxes, but according to this court the lessor was the owner of the soda fountain when he sent it into this state. Why not make him pay the taxes on his own property, and, if necessary, or if he can, let him enforce his contract and reimburse himself?

Appellee in this case was a party to the Dearman Case, and it was definitely advised that its printed contract was a lease, and when this contract was signed both parties thereto undoubtedly understood just what

they were doing. They agreed to make a lease contract, and as a part of the consideration lessee agreed to pay the taxes. We have nothing to do with the agreement to pay taxes, except to consider it in arriving at the intention of the parties. The property must be assessed to the owner, and this court has already located the owner in the Dearman Case.

Let us consider for a moment the Dearman Case. The Puffer Manufacturing Company, appellee here, contended that the instrument prepared by itself, with the utmost care, was not what it purported to be; that it did not mean what it said. The reason for this contention was then as now to escape the penalties of ownership.

Judge Whitfield, speaking for the court, rejected appellee's contention, and held that appellee had carefully and unmistakably chosen for itself its relation to Mr. Dearman. The contract was written for the express purpose of retaining the ownership of the property in the Puffer Manufacturing Company, and, this being true, no court would permit appellee to shift its chosen position to escape the burden self-imposed by the contract. This, at least, was exact justice, and the law aims to administer justice. Not only was the decision the essence of common sense, but it is impossible to discover any weakness in the reasoning of the learned judge, tested by the rules of law as administered by the courts.

It is reasonably certain that the decision of this court in the Dearman Case announces a "rule of property," which should, for reasons of policy, be adhered to. The contract interpreted in that case was labeled a lease. The same contract should not now be changed into a conditional sale. The parties to this contract knew that they were executing a contract of lease, because this court had already laid down a rule of construction of this very contract, announcing that the very contract in question created the relationship of lessor and lessee between the contracting parties. By

appealing to the rule of property principle, however, we do not admit that there is any weakness in the former decision, but merely mean to say, if we concede the strength of appellee's reasoning, it does not follow that this case should be affirmed. Certainly, the lessee could rely on a precise decision of the highest court of the state to define his property rights.

In the Dearman Case the ownership of the thing leased was placed in the lessor. The lessee in this case, of course, contracted with the knowledge that his *status* was fixed by judicial decree, and the freedom of contract would be denied should we now hold that this contract was not a lease, but is a conditional sale. The intention of the parties to the contract cannot be doubted in the light of the Dearman Case, and there is no rule of reason or law warranting this court to make a contract for the parties.

We come now to the narrow question presented by this record, viz: To whom should the property be assessed?

Judge Cooley in his excellent work on Taxation (3d Ed.), p. 731, discussing this question, answers it in this way:

"By the owner of property for the purposes of assessment is meant the legal, and not the equitable, owner; . . . therefore trustees having the legal title are properly assessed."

The learned author, and we know of none of greater learning pursuing the subject, says:

"Where land is sold by executory contract, it is rightly assessed to the vendor until the vendee becomes entitled to a conveyance."

Appellee insists that the property was sold to the appellee upon the condition that he should become entitled to a conveyance of the legal title by his compliance with the terms of his executory contract; that the contract executed by the parties was, in fact, and by its terms, merely a conditional sale.

Granting the soundness of this contention, what then follows? If Judge Cooley is right, the property should be assessed to the seller of the property, for the reason that the legal title to the property was to remain in the seller until the purchaser complied with the terms of his contract. For purposes of taxation the state is not required to adjust the equities between the contracting parties, the taxing board seeks the legal owner, and when he is found, the property is assessed to him. Any other rule, it seems to us, would place upon the taxing authorities an intolerable burden and lead to complications and entanglements which would be impossible of solution, and from which the most learned chancellor might shrink.

When the taxing board discovers the owner of the legal title, its duties are performed when it assesses the property to such owner. The equities and contractual obligations between the parties to the executory contract do not concern the taxing board. The courts are open for their enforcement and adjustment, and in the meantime the revenues of the state will be collected from the legal owner, or by sale of the property assessed.

The case of *Watson v. Sawyers et al.*, 54 Miss. 64, is cited as holding a view opposite to the rule we have announced. We do not think so. That case was begun by the vendor for the specific performance of a contract for the sale of land. The vendee had allowed the land to be forfeited for taxes, and it was held that under the contract the vendee should have paid the taxes. The report of the case does not state the facts recited by the bill of complaint, but we assume that the land had been sold and the terms had been agreed to, and the vendor had executed a bond for title embodying the contract, but it seems that there was no agreement as to who was to pay the taxes, and the court held as between the parties to the contract without special

stipulations to the contrary the vendee should have paid the taxes. This case, we think, does not decide the question here involved. In that case the court held that the vendee was in default and could not set up the vendor's failure to pay the taxes as a defense to the specific performance of the contract; that he should have paid the taxes.

That may be true in this case, if this was a suit between the lessor and lessee, indeed, the contract specifically provides that the lessee shall pay the taxes, but this is a suit between the state and the owner of the legal title, and for the purposes of assessment the state will look to him, and he can look to the lessee for reimbursement, if he is entitled thereto. It is important to keep in mind the parties to this suit.

It is unthinkable to us that the taxing officers must institute inquiries as to the equities between the parties to private contracts. It is only necessary that they ascertain the holder of the legal title, and leave to a court of equity the onerous and delicate job of fixing the duties and obligations of each of the contracting parties as between themselves.

These being our views, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

STEVENSON v. YAZOO & M. V. R. Co.

[74 South. 132, Division B.]

TRIAL. Instructions. Degree of proof.

In a suit for damages to plaintiff's pasture by fire started on a railroad right of way, where the defense was that the fire originated elsewhere, an instruction that if the jury was in doubt as to the origin of the fire, and could not say of a certainty which fire was the cause of the damages, they should find for the defendant, is erroneous, because it imposes on the plaintiff a greater burden of proof than the law requires.

APPEAL from the circuit court of Tallahatchie county.
HON. E. D. DINKINS, Judge.

Suit by D. B. Stevenson against the Yazoo & Mississippi Valley Railroad. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Ward & Ward, for appellant.

Mayes, Wells May & Sanders, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

This is an appeal by D. B. Stevenson from a judgment of the circuit court of the Second district of Tallahatchie county rendered in favor of the appellee, who was defendant below. The suit was for trespass for damage to the pasture and premises of the plaintiff caused by a fire which occurred in November, 1914. On the plaintiff's testimony, and some other witnesses introduced by him, it was shown or contended that a section crew of the railroad company set grass on fire upon the right of way of the railroad that burned over and spread to the premises of the plaintiff and burned off the grass and cane growing in his pasture doing damage to the same. It was in proof by the defendant,

and by some other witnesses both for the plaintiff and defendant, that there was fire near the complainant's premises, and that there was a general burning in the community; in other words, that the leaves and grass were burning over considerable portions of the community, and the defendant's proof showed that what burning it did on its right of way was to fight against the fire, which was raging without fault of the railroad company, and that the fire was blown across the railroad track and right of way and spread upon the defendant's premises without fault or negligence on the part of the railroad company and its employees; in other words, there is proof in the record to support a verdict for either party if there was no error in the instructions. In this condition of the evidence the court gave instruction No. 3 for the defendant, which is complained of as error here, which reads as follows:

"The court instructs the jury for the defendant in this case that, if you believe from the testimony that on the day in question fire swept the pasture lands of plaintiff and destroyed the grass and cane on the same, came from the south and off the way lands of the defendant and was blown across the tracks by the wind, or was fire that was burning on the same side of the track on which plaintiff's lands are located and was swept by the wind down towards the plaintiff's pasture and on same, and that this fire the defendant had nothing to do with and did not originate, then it is immaterial whether fire started on defendant's right of way by section hands in protecting defendant's right of way property escaped onto the lands of plaintiff and burned same off as testified by the witnesses, because the damage the plaintiff complains of must have been due solely to fire started by defendant's employees and permitted by them to escape onto the property of plaintiff; and further the court charges you that, if you are in doubt about this proposition and cannot say of a certainty which was the cause of the damage, then it

is your duty under the law to return a verdict for the defendant."

This instruction placed a greater degree of proof upon the plaintiff than the law requires, and constitutes reversible error. It is stronger than the instruction condemned in the case of *Gentry v. Gulf & Ship Island R. R. Co.*, 109 Miss., 66, 67 So. 849. In that case the instruction was in the following language:

"The court instructs the jury, for the defendant, that if they are in doubt as to whether plaintiff was injured or not in the derailment of the train, and this doubt cannot be removed by a clear preponderance of the evidence in the case, the verdict of the jury should be, 'We the jury, find for the defendant.'"

Judge Cook, speaking for the court, says:

"This instruction imposes on a plaintiff a greater burden than the law imposes on the state in a criminal trial. In a criminal trial the state must prove its case beyond all reasonable doubt. By this instruction the plaintiff must remove all doubt from the minds of the jury—and that is not all; the plaintiff must remove all doubt—'by a clear preponderance of the evidence.' The plaintiff must establish his right to recover by a preponderance of the evidence. Whenever the jury is satisfied that the plaintiff has proven his case, the plaintiff is entitled to recover. The law imposes on the plaintiff no burden to remove all doubts from the minds of the jury."

The instruction in this case not only requires all doubts to be overcome by the plaintiff by a preponderance of the testimony, but by it the jury must say "of a certainty" which kind of fire caused the damage.

But for this erroneous instruction the case would have been affirmed, but the giving of it is reversible error, and the cause is therefore reversed and remanded.

Reversed and remanded.

INDEX.

ABORTION.

1. *Attempts. Indictment. Sufficiency.*

Under Code 1906, section 1235, making it manslaughter to administer or use medical or other means with intent thereby to destroy an unborn child and thereby destroy such child, unless the same shall have been advised by a physician to be necessary etc., and section 1049, providing that every person who shall attempt to commit an offense and shall do any overt act towards the commission thereof, but shall fail, etc., on conviction shall be punished etc. An indictment which charges that defendant did willfully, unlawfully, feloniously design and endeavor to kill, abort, and destroy one unborn quick child, then and there in the womb of a woman then and there pregnant, by willfully, unlawfully and feloniously administering to and inserting in the womb of the said woman certain foreign substances etc., with the felonious intent then and there the said unborn quick child, in the womb of said woman as aforesaid, willfully, unlawfully and feloniously to kill, abort and destroy, contrary to the form of the statute etc., sufficiently charges the crime of an attempt to commit an abortion. *Smith v. State*, 802.

2. *Indictment and information. Negating exceptions. Necessity.*

The exception in section 1235, Code 1906, defining abortion "unless the same shall have been advised by a physician" etc., need not be negated as it is an affirmative defense, which if relied upon must be shown by the defendant or appear affirmatively in the evidence. *Id.*

3. *Criminal prosecution. Instruction.*

In a prosecution under Code 1906, section 1234, for attempting to commit an abortion, an instruction that, if the jury believe beyond a reasonable doubt from the evidence that accused willfully, unlawfully, and feloniously inserted in the uterus or womb, of a woman a rubber catheter and gauze with the intention and purpose of causing an abortion or destroying an unborn quick child then in said womb, he is guilty as charged in the indictment, and the court further charges the jury that this is true even though you may believe from the evidence that the woman was an unmarried woman, and that said unborn child was an illegitimate one, was a proper instruction. *Id.*

ACCOUNT.

Discovery. Facts warranting relief.

Where a bill charged business dealings between the parties for several years, that the accounts between them are mutual ac-

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ACCOUNT—Continued.

counts and are complicated, and that the status of the accounts was within the knowledge of defendants, and praying for a discovery and accounting and decree accordingly and the bill further charges that all the defendants were indebted to complainant in a gross sum, a part of which was due and owing by two of the defendants and the other part by the other defendant and that on account of the relation of all parties to each other the indebtedness was a joint liability, and that complainant had no knowledge as to the amount due by each and that a discovery was necessary; such facts alleged in the bill of complainant were sufficient to warrant the lower court in granting the relief prayed for. *Realty Agent v. Mortgage & Bond Co.*, 181.

ACTIONS—RIGHT AND CAUSE.

1. *Frauds, Statutes of. Promise to pay debt of another. Contracts. Promise to pay third party.*

Where R gave K an order for money, under a promise to pay M, to whom R was indebted, a part of it, such promise of K was not a promise to pay the debt of another, within the statute of frauds. *Moore v. Kirkland*, 55.

2. *Same.*

In such case M could sue on the promise of K in his own name although the promise was communicated to M. by R. alone. *Id.*

3. *Injunction. Right to injunction. Persons entitled. Irreparable injury. Enjoining elections.*

The general rule is that an injunction will not lie to restrain the holding of an election, but there may be elections authorizing bond issues or directly affecting property rights, and if such an election is attempted to be held without authority of law, equity might well interfere. *Power v. Ratliff*, 88.

4. *Injunction. Right to injunction. Persons entitled.*

Where tax payers objected to the submission of a legislative act to referendum vote on the ground that the constitutional amendment appearing in Laws 1914, chapter 520, providing for initiative and referendum was invalid, they do not suffer an irreparable injury entitling them to an injunction where the question is to be shortly submitted at a general election and the expense will be slight. *Id.*

5. *Injunction. Right to injunction. Irreparable injury.*

A game warden appointed under Laws 1916, chapter 99, cannot secure an order enjoining submission of the act to a referendum vote on the theory that he is entitled to the emoluments of his office and that a referendum of the act to the voters would work

ACTIONS—RIGHT AND CAUSE.

ACTIONS—RIGHT AND CAUSE—Continued.

irreparable injury and on the theory that the constitutional amendment found in Laws 1914, chapter 520, providing for initiative and referendum was void for the law might be upheld by the voters, and if repealed the warden could then call in question the right of the people to nullify the act. *Ib.*

6. *Injunctions. Enjoining elections.*

Though the constitutional amendment found in Laws 1916, chapter 520, providing for initiative and referendum be void, a referendum election cannot be enjoined on the theory that if legislation be repealed, the repeal will be invalid, but the proper procedure is to take appropriate action to prevent the execution of any proposition voted upon, since the question of the validity of legislation is not one for the courts until the legislation is completed and until then the courts cannot determine whether the proper forms have been pursued. *Ib.*

7. *Gaming. Futures. Recovery of loss. Statutes. Agent or intermediary. Money lent or advanced. Cancellation of mortgage. Invalidity. Wages.*

Under Laws 1908, chapter 118, prohibiting dealings in futures and declaring such contracts unlawful and section 9 providing that the wife of a person sustaining a loss in future transactions, may within five years, recover, by suit, the amount so lost as liquidated damages from the broker, agent, or intermediary negotiating such transactions, a bank which did not represent any cotton broker with whom plaintiff's husband did business, did not receive the market quotations, and take orders for future contracts, had no private wire over which to receive quotations and to submit orders, in short was not the agent or intermediary through whom plaintiff's husband did a gambling business, was not liable to the wife for the losses of her husband in gambling transactions in futures. *Cohn v. Brinson*, 348.

8. *Gaming. Money lent or advanced. Recovery. Statutes.*

Under Code 1906, section 2302, giving a right to the wife of any one losing and paying money at gaming or wagering, a right to recover it, without expressly giving the wife the right to recover from a bank money knowingly lent or advanced for the purpose of gambling and section 2303, declaring futures unlawful, and giving her the right to sue for and recover money lost and paid on futures from the principal or agent knowingly receiving the money on such illegal transactions, the wife of one dealing in cotton futures directly with brokers in another state, could not recover money lent or advanced by a bank which knew of the borrower's dealings and never repaid, except by renewals

ACTIONS—RIGHT AND CAUSE.

ACTIONS—RIGHT AND CAUSE—Continued.

forming a part of the consideration of a note secured by a mortgage of her homestead and other property. *Ib.*

9. *Gaming. Dealing in futures. Recovery. Statutes.*

Under Code 1906, section 2300, making absolutely void and unenforceable any contract for the reimbursing, or repayment of any money knowingly lent or advanced for the purpose of gambling, and section 2301, providing that any mortgage or conveyance of any real estate to satisfy or secure money loaned or advanced for such purpose shall vest in the wife and children of the mortgagor the whole title of the mortgagor as though he had died intestate, the wife of one to whom a defendant bank knowingly lent or advanced money for use in dealing in cotton futures, unpaid except by renewals forming a part of the consideration for a note secured by a mortgage executed by herself and husband including their homestead and her separate property, was entitled to have the mortgage cancelled whereupon the property would immediately vest in herself and children if any. *Ib.*

10. *Same.*

In such case it was immaterial that the borrower had the right to buy cotton futures by mail or wire directly from brokers in another state, since it is the policy of the law to prohibit gambling of any kind and to deny the courts of the state to enforce gambling contracts no matter where made. *Ib.*

11. *Railroads. Personal injury. Obstructions appearing on the road.*

Under the Tennessee statutes, Shannon's Code, section 1574, providing that every railroad shall keep its engineer, fireman, or some other person upon the locomotive always upon the lookout ahead, and that when any person or other obstruction appear upon the road, the alarm whistle shall be sounded, the breaks put down and every possible means employed to prevent an accident. Where plaintiff while standing on the railroad track with a lighted paper in her hand flagging the train was struck by a passing train, she was such an "obstruction upon the road" as required the precautionary measures prescribed by said statute. *Turner v. Railway Co.*, 359.

12. *Same.*

The court held that under the evidence set out in the opinion in this case a peremptory instruction for defendant was erroneous. *Ib.*

13. *Principal and surety. Action on surety bond. Evidence.*

In an action by a portrait company on a bond of its district manager given for the faithful performance of his contract, plaintiff

ACTIONS—RIGHT AND CAUSE.

ACTIONS—RIGHT AND CAUSE—Continued.

made out a *prima-facie* case for recovery when it showed the balance due from the manager and no extension of time without the consent of the sureties or other action releasing them from the bond. *Portrait Co. v. Maddox*, 434.

14. *States. Liability to suits. Sufficiency of bill. Officers. Authority. Auditor. Involuntary dismissal. Venue. Change. Defendant's residence.*

Under Code 1906, section 4800, so providing, persons having claims against the state must submit them to the auditor before suit and an action cannot be brought upon such a claim which the auditor has no authority to audit and allow. *Export Co. v. State*, 452.

15. *State. Sufficiency of bill.*

A bill in equity against the state for alleged breach of a contract made by the governor with the complainant, but not showing any authority on the governor's part to make the contract, does not show a binding contract on the state. *Ib.*

16. *State. Officers. Authority. Auditor.*

The auditor of the state has no authority to audit and allow a claim for damages for breach of contract. *Ib.*

17. *States. Liability to suit.*

A chancery court has no general equity power to decree what the state should pay for an alleged breach of contract. The authority to sue the state has always been a subject of legislation in this state and the legislature having dealt with and treated the subject, its treatment and its statutory enactment must be regarded as exclusive of any remedy by common law or original equity jurisdiction. *Ib.*

18. *Partition. Right to maintain. Possession of legal title.*

An instrument of writing signed by an heir under a will which combines a contract for professional service, a power of attorney and security for a fee, but fails to convey any legal title to property, is not a sufficient basis for an action for partition by the attorney to whom such instrument was given against such heir. *Wright v. Bowers*, 516.

19. *Taxation. Tax title. Judgment. Conclusiveness. Void tax sale. Presentation of claim. State's liability to suit. Venue.*

Where in an action under Code 1906, section 2927, to confirm a tax title conveyed by the state there was a decree declaring the purchasers title void, such a decree would justify the presentation to the auditor of a claim for the purchase money and if the auditor should refuse to issue a warrant in payment of the

 ACTS CITED AND CONSTRUED.

ACTIONS—RIGHT AND CAUSE—Continued.

claim thus presented then, and not until then, could the purchaser under section 4800 of the code institute a suit against the state. *Land Commissioners v. Ford*, 678.

20. *States. Liabilities to suit.*

A suit against the land commissioner to recover the purchase price of a tax title subsequently declared void is really an action against the state, in its sovereign capacity and is controlled by section 4800, of Code 1906. *Ib.*

21. *Taxation. Void tax title. Statute.*

Under section 4801, Code 1906, so providing, a bill to recover from the state the purchase price of a void tax sale cannot be taken as confessed. *Ib.*

22. *Insurance. Recovery on policy. Interest.*

In a suit on a life policy, providing for payment "on receipt of satisfactory proofs of death of the assured," where assured disappeared and proofs were not made until seven years thereafter, and shortly before the bringing of the suit on the policy, the insurer was not liable for interest on the amount of the policy before the commencement of the suit, although it was shown that assured died on the date of his disappearance. *Life Assur. Soc. v. Brame*, 859.

23. *Insurance. Payment of premiums. Recovery. Interest.*

Where insured in a life insurance policy disappeared and his beneficiary continued to pay premiums on such policy until the expiration of seven years from his disappearance, she could recover premiums so paid and interest thereon from the dates of payment respectively, if it was found that he died on the date of his disappearance. *Ib.*

ACTS CITED AND CONSTRUED.

1887. Commerce. Exclusive power of congress. Interstate Commerce Commission authority. Evidence. Presumption. Compliance with law. Telegraphs. Action for failure to deliver. Damages for mental suffering. Punitive damages. Federal law. *Telegraph Co. v. Showers*, 411.
1916. Statutes. General and special acts. Taxation. *Johnson v. Reeves & Co.*, 227.
1916. Corporations. Foreign corporations. Filing charter. Statute. Now doing business within the state. Construction. Retroactive effect. *Power v. Mortgage*, 319.

 ADMISSIONS—ADVERSE POSSESSION.

ADMISSIONS.

1. *Limitation of actions. Acknowledgment of debt. Admission to procure compromises.*

An admission contained in a writing the purpose of which is to procure a compromise of a barred demand, does not operate as an acknowledgment of the debt so as to remove the bar of the Statute. *Philp v. Hicks*, 582.

2. *Limitation of actions. Acknowledgment of debt. Certainty and definiteness.*

Where a debtor whose debt had become barred by limitation wrote a letter stating that the note had been brought to his attention and had thought it had been paid, and continuing "but as I noted that the note has not been stamped with any cancellation stamp same certainly must still be unpaid" and offering to settle for a lump sum such letter was not sufficient to remove the bar of the statute, since there was no express and definite acknowledgment of the debt nor any express promise to pay it. *Id.*

3. *Pleadings. Effect.*

Where one claiming land adversely was joined as a plaintiff in a bill by the true owner of the land, but in fact had nothing to do with the suit, and did not read the bill, or authorize the other party's attorney to make claim by the bill, except by adverse possession, he was in no way bound by allegations of the bill to a different effect. *Pigott v. Pigott*, 873.

AD VALOREM.

See TAXATION.

ADVERSE POSSESSION.

1. *Sufficiency of evidence. Color of title. Possession and occupation. Actual possession. Burden of proof.*

On a bill to confirm title and to cancel defendant's claims, the court held that the evidence set out in the opinion of the court did not establish that defendant entered the land under color of title. *Dedeaux v. Lumber Co.*, 325.

2. *Possession and occupation.*

Where a party has no color of title to land, he can only acquire title by adverse possession to such part of the land as he has actually held in possession and inclosed, or otherwise actually and continuously occupied, for the statutory period of ten years. *Id.*

3. *Same.*

Where a party occasionally went upon the land, and cut timber thereon and at other intervals burnt some coal kilns on the

 ALIMONY—ANIMALS.

ADVERSE POSSESSION—Continued.

land but this occupation of the land was not continuous and hostile, nor for a period of ten years, such occupancy falls short of conferring title by adverse possession. *Ib.*

4. *Burden of proof.*

Where on a bill to confirm title and cancel defendant's claims, the defendant admitted the validity of plaintiff's paper title, but claimed title by adverse possession, the burden of establishing his title by adverse possession is on him. *Ib.*

ALIMONY.

1. *Divorce. Custody of children. Proceeding to modify decree. Payment of wife's counsel fees.*

The allowance of alimony is justified by the natural obligation of the husband as the bread winner of the family, to support his wife. If there is no legal marriage of the parties, there is no legal obligation on the husband for this support or for alimony. *Robinson v. Robinson*, 224.

2. *Divorce. Custody of children. Proceedings to modify decree. Payment of wife's counsel fees.*

Where a husband and wife have been divorced and the wife allowed alimony in a gross sum, the husband is not liable for the wife's counsel fees in a subsequent proceeding to modify the final decree in the divorce proceeding so as to award the custody of the children to the wife, since the parties were then legally strangers to each other and there being no statutory authority for such an allowance. *Ib.*

ANIMALS.

1. *Tax or license. Constitutional provisions. Equal protection of the law. Dog tax. Evidence. Judicial notice. Ex post facto law. Imprisonment for debt. Repeal of law.*

Laws 1910, chapter 110, providing for a tax of one dollar on every male dog over six months old, and three dollars on every female dog over six months old and leaving it optional with each county whether its provisions shall be put in operation therein, either by the board of supervisors or by an election, does not violate section 112, Constitution 1890, authorizing the legislature to impose a tax upon such domestic animals as from their nature and habits are destructive of other property. Nor does it violate the Fourteenth amendment of the Constitution of the United States, securing to every citizen the equal protection of the law, since while it discriminates between male and female dogs, it applies to every owner of dogs in the same situation. *State v. Widman*, 1.

ANTI-TIPPING STATUTE—APPEAL AND ERROR.

ANIMALS—Continued.

2. *Evidence. Judicial notice. Character and habits of domestic animals.*

The courts take judicial notice of the character and habits of domestic animals. *Ib.*

ANTI-TIPPING STATUTE.

See RAILROADS.

APPEAL AND ERROR.

1. *Municipal corporations. Ordinances. Questions of law.*

Under Code 1906, section 40, paragraph 2, providing for appeals by the state or a municipality from a judgment in the circuit court acquitting the defendant, where a question of law has been decided adversely to the state or municipality, where a defendant was acquitted before the circuit court on a charge of violating a city ordinance, the case by agreement being tried before the circuit judge, who decided that the evidence "did not show the offense charged in the affidavit," and discharged the defendant, in such case the record does not present a question of law within the meaning of said code section and the city was not entitled to appeal. *City of Jackson v. Harland*, 41.

2. *Criminal law. Credibility of witnesses.*

It was the province of the jury to pass upon the credibility of witnesses and the discrepancies in their testimony given at one trial and then at another. It is not for the supreme court to say that witnesses were unworthy of belief. *Wells v. State*, 76.

3. *Justice of the peace. Time of taking.*

Since in our state there is no such thing as a justice of the peace having the right to grant a new trial, the defendant against whom judgment by default is rendered should perfect his appeal within the time allowed by law after the rendition of the judgment. *Welch v. Hannie*, 79.

4. *Review. Questions to decided.*

The supreme court is not called on to decide the legal aspect of a purely imaginary contingency. *Rosenstock v. Board of Sup'rs.*, 124.

5. *Bond. Insufficient amount. New bond.*

Where an appeal bond was defective because the penalty was too small, it was not a nullity and the appellant under Code 1906, section 92, so providing, had the right to file a new bond. *Thorsen v. Ill. Cent. R. Co.*, 139.

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

6. *Criminal law. Examination of juror. Race prejudice.*

Where on a trial of a negro for murder, a juror was asked on his *votr dire*, whether he had any prejudice against the negro as a negro that would induce him to return a verdict on less or slighter evidence than he would return a verdict of guilty against a white man under the same circumstances, it was reversible error not to allow the juror to answer. *Hill v. State*, 260.

7. *Principal and agent. Individual transaction of agent.*

Where defendant gave a written order for flour to plaintiff's agent to be charged to the agent but shipped to defendant, and the order was received by plaintiff, together with a forged order directing that the flour be charged to defendant, and plaintiff, without notifying defendant that it would not ship under the first order, shipped the flour under the forged order, and defendant received and disposed of the flour, believing that it had been charged to the agent who owed the defendant, in such case plaintiff must suffer the loss caused by the act of its accredited agent and cannot recover from defendant for the flour. *Filder v. Acme Mills*, 322.

8. *Homicide. Instructions. Manslaughter. Evidence.*

In a trial for homicide where the evidence was conflicting as to who was the aggressor in a fight during which one of the participants was killed by the other and the jury might have believed from the evidence that the killing was in the heat of passion, an instruction on manslaughter should have been given when asked for by the defendant and the failure in such case to give such instruction was reversible error. *Martin v. State*, 365.

9. *Criminal law. Reversal. Proof of venue.*

Under Code 1906, section 1401, providing that doubt as to the county in which the offense was committed shall not avail to procure acquittal, the supreme court is precluded from reversing a case even though the evidence leaves the venue in doubt. *Hill v. State*, 375.

10. *Disposition of cause. Reward on special issue.*

Under Supreme Court Rule 13, so providing when a judgment is reversed and a new trial ordered because the damages are excessive or inadequate and for no other reason the judgment will be set aside only as to damages and be good in all other respects and where a judgment was reversed because of the refusal of the court below to grant an instruction bearing solely on the measure of damages, and the cause then remanded generally, a motion to

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

correct the judgment so as to remand the case for trial only on the question of damages will be sustained. *Railroad Co. v. Boon*, 493

11. *Record. Presumption.*

In an action on a mutual benefit policy if it was necessary to produce the original policy, on appeal this will be presumed to have been done, where the record by bill of exceptions or otherwise fails to show that the policy was not produced on the trial. *Woodman Benefit Assn. v. Ivy*, 494.

12. *Orders appealable. Interlocutory orders.*

The right to appeal in any case to the supreme court is regulated and defined by statute and where the court sustained a demurrer to the bill on the ground that it was not sufficient and granted sixty days to amend, an appeal taken to settle the principles of the case will be dismissed in the supreme court, since such decree does not require the payment of money; does not change the possession of property and an appeal therefrom does not settle the principle of the case nor does the prosecution of such appeal avoid expenses and delay but on the contrary, adds to the expenses, and if entertained, will greatly delay the final adjudication on the merits. *Armstrong v. Moore*, 511.

13. *Municipal Corporations. Ordinances extending limits. Appeal statute.*

Where a city formerly operating under chapter 99 of the Code of 1906, after the passage of the commission government (chapter 120, Laws 1912), adopted the commission form of government and after coming under commission form of government proceeded to extend the limits of the city under section 3301 of Code 1906, chapter 120, Laws of 1912, providing no scheme for extending corporate limits; an appeal from an ordinance making such extension lies to the circuit court on compliance with section 3303 of the code and such appeal should not be dismissed on the theory that section 18 of chapter 120, Laws 1912, suspended or superseded sections 3303 and 3304 as to cities under commission form of government since the referendum provision contained in chapter 120, Laws 1912, and chapter 158, Laws 1912, do not affect the code sections on appeals in such cases. *Gregory v. City of Amory*, 604.

14. *Criminal law. Continuance.*

Where accused was indicted for having carnal knowledge of a previously chaste female younger than himself, and was released on his agreement to marry her, and he procured a marriage

Opinion of the court.

[112 Miss.]

Gates T. Ivy and Roberds & Beckett, for appellant.

Critz & Critz, Paine & Paine and Leftwitch & Tubb, for appellees.

SMITH, C. J., delivered the opinion of the court.

This is a suit for the partition of land instituted by appellant, who claims to be the owner of a one-half interest therein.

In 1887 Dr. T. W. Spruill died seised and possessed of the land, leaving as his heirs at law his widow, two sons, and a daughter, Mrs. Maggie S. Barksdale. In May, 1892, Mrs. Spruill and her two sons, by deed duly executed and recorded, conveyed their interest in the land to Mrs. Barksdale, and she continued the owner thereof until her death, which occurred October 2, 1893. She left surviving her as her sole heirs her husband, H. C. Barksdale, and one son, H. Clay Barksdale, the appellant who was then an infant four years old. In January, 1893, prior to her death, Mrs. Barksdale and her husband executed a deed of trust to Hearn & Co. to secure the payment to him of their joint notes aggregating the sum of three thousand, three hundred thirty-six dollars and fifty cents due January 1, 1894 and 1895, and advancements to be thereafter made by Hearn to them. That the grantors in this deed of trust were husband and wife was not disclosed either in the body or in the acknowledgment thereof. On February 1, 1894, after Mrs. Barksdale's death, her husband, H. C. Barksdale, executed another deed of trust to Hearn & Co. on "all the interest of the party of the first part" in the land described in the former deed of trust. On March 15, 1898, the deed of trust executed by Mrs. Barksdale to Hearn & Co. was foreclosed and the land bought in by H. C. Barksdale for the sum of four thousand, nine hundred and fifty dollars. The deed executed to him by the trustee pursuant to this sale acknowledged payment of this sum, but it appears from the

evidence that no money was in fact paid by Barksdale, but that the amount of his bid was credited by Hearn & Co. on the notes given by Mr. and Mrs. Barksdale, and Barksdale then executed to them a new note for the sum of five thousand, five hundred dollars securing the payment thereof by a deed of trust on the land duly executed and recorded. On April 25, 1898, Barksdale executed a second deed of trust on the land to Hearn & Co. securing the payment to them of the sum of five thousand, five hundred dollars to correct an error in the first deed of trust executed by him. In the preambles of both of these deeds of trust after the name of the grantor, H. C. Barksdale, appears in parenthesis the word "widower." Barksdale seems to have been living on the land at the time of his wife's death, but some time thereafter and prior to the year 1900 he removed therefrom, and did not thereafter live thereon. His son, appellant, resided with him. On January 1, 1900, H. C. Barksdale sold the land to R. D. Herron by warranty deed for the sum of eight thousand, six hundred thirty-two dollars, the receipt thereof being acknowledged in the deed, and with which the notes due by Barksdale to Hearn & Co. were paid and Hearn's deed of trust satisfied. At the time Herron made this purchase he saw the deed of trust given by Mrs. Barksdale and her husband to Hearn & Co., but made no inquiry into the state of the title to the land. He did not know until some time after his purchase of the land that Maggie S. and H. C. Barksdale were husband and wife, nor that Mrs. Barksdale was dead and had left a son surviving her. The only notice he had as to the state of the title was that with which he was charged by the recorded deeds and deeds of trust dealing therewith. Herron immediately went into possession of the land and continued in possession thereof until he sold the same to appellees Learnard and Walker. On December 3, 1906, Herron sold forty acres of the land to Fred and Felix Walker for a cash consideration of one thou-

sand, two hundred dollars; the Walkers on the same day executing to him a deed of trust to secure the payment of three notes aggregating the sum of one thousand, three hundred fifty-seven dollars and sixty-eight cents, which deed of trust, so far as the record discloses, has never been satisfied. One of the Walkers afterwards executed a deed of trust to the First National Bank of Aberdeen to secure the payment to it of an indebtedness due it by Walker, which deed of trust is still in full force and effect. On December 3, 1906, Herron executed a deed of trust on the land, excepting that sold to the Walkers, to W. A. Kirkpatrick to secure a note for six thousand dollars due him by Herron, which note and deed of trust securing it were by Kirkpatrick assigned in July, 1910, to G. B. Gehlert. On August 23, 1910, Herron sold the land, excepting that previously sold by him to the Walkers, by deed duly executed and recorded, to J. P. Learnard, the consideration therefor being seven thousand dollars in cash, the assumption by Learnard of six thousand dollars due by Herron to Gehlert, and four notes executed to Herron by Learnard for one thousand, seven hundred fifty dollars each, due respectively July 22, 1911, 1912, 1913, and 1914. All of these notes except the last had been paid by Learnard when the bill in this case was filed. Learnard died on April 30, 1913, and by last will and testament devised the land to his widow and two children, Robert and Josephine. H. C. Barksdale, appellant's father died in December, 1906; and appellant became twenty-one years of age on August 9, 1910. As the decision of the cause does not turn upon any knowledge which appellant may or may not have had of his rights in the premises prior to the filing of his bill, a statement of his claim and of the evidence relative thereto is not here material.

The parties defendant to the bill are Herron, Mrs. Learnard, her children, the Walkers, and the parties now holding deeds of trust on the land. The prayer of the

bill is for a partition of the land and for an accounting to appellant by the Learnards and Walkers for the rents and profits thereof and for appropriate relief with reference to the incumbrances thereon.

One of appellees' defenses to the bill is that they are all *bona fide* purchasers and incumbrancers of the land, as the case may be, for value without notice of appellant's claim to an interest therein.

Appellant denies that appellees are purchasers and incumbrancers of the land for value without notice of his claim thereto, and contends that, conceding this to be true, such defense is not available against him, because: First, the purchaser for value without notice defense is available only against the holder of a secret equity, and that his interest in the land is legal, and not equitable, for the reason that the purchase thereof by his cotenant at the trustee's sale inured to his benefit; and, second, he was an infant at the time the various deeds and deeds of trust set up by appellees were given.

The court below held that "Herron bought said land with notice of complainant's interest therein," that the Walkers "paid a valuable consideration therefor without notice of complainant's claim," that Learnard purchased from Herron without notice of complainant's interest in the land, and that his widow and children are entitled to the protection accorded a *bona fide* purchaser without notice, except as to the note and interest thereon executed by Learnard to Herron remaining unpaid at the time appellant's bill was filed, and that Gehlert, Kirkpatrick's assignee, and the First National Bank of Aberdeen were innocent incumbrancers for value without notice of appellant's claim and decreed that the only relief to which appellant was entitled was to receive from the Learnards the money due on J. P. Learnard's unpaid note to Herron. From this decree there is a direct appeal by H. Clay Barksdale, complainant in the court below, and a cross-appeal by Herron.

Counsel for appellant do not claim that Herron had any actual knowledge of appellant's interest in the land, but that he must be charged with constructive notice thereof for the reason that, in the language of counsel's brief:

"(a) The lands were deeded by W. B. Brock and husband, S. M. Brock, in May, 1892, to T. W. Spruill. The next conveyance is from Jno. B. Spruill and Sarah E. Spruill to Maggie S. Barksdale. The title stood in T. W. Spruill. Why were Jno. B. Spruill and Sarah E. Spruill making a deed to it? What interest had they in the land? That is the human and natural inquiry. An investigation would have shown that they were heirs of T. W. Spruill and would have revealed that Maggie S. Barksdale was an heir also, Jno. B. Spruill, son, Sarah E. Spruill, wife, and Maggie Spruill Barksdale, daughter, being the only heirs of T. W. Spruill. T. W. Spruill owned the land on the record. A mere inquiry as to why he did not sign the deed (the most natural inquiry to make) would have disclosed that he was dead and explained why John E. Spruill, and Sarah E. Spruill signed the deed as his heirs, and that Maggie S. Barksdale was the only heir, she not joining as grantor because she was grantee. Sufficient in this, it seems, to give any prudent purchaser notice."

In passing we will say that Herron was, of course, charged with notice that the land was owned by Mrs. Barksdale at the time of the execution of the deed of trust by her and her husband to Hearn & Co. Taking up again the language of counsel:

"(b) The next record after the property was deeded to Mrs. Barksdale is the deed of trust signed by Maggie S. Barksdale and H. C. Barksdale to McClellan, trustee, dated January 16, 1893. The title was in Mrs. Barksdale. Why was H. C. Barksdale signing unless he was the husband, and this land was a homestead?

"(c) The deed of trust provides for one thousand, five hundred dollars advancements, which would indi-

cate that this land was being occupied and used by the grantors.

“(d) Again H. C. Barksdale, on January 1, 1894, not quite a year later, signed a deed of trust on the same land to A. M. Chandler, trustee, for Hearn & Co. Barksdale had no title to the land. Why did he sign the deed of trust alone? A mere inquiry would have revealed that Mrs. Barksdale was dead, and then the natural inquiry would be, Who were her heirs?

“(e) Also in this same deed of trust made in January after the death of Mrs. Barksdale in October conveyed ‘all the interest of the party of the first part in the following land.’ The joint deed of trust had no such provision. Why this restriction? To answer the question reveals that the grantor had only half interest, and his son, the complainant, the other.

“(f) Next is the deed from McClellan, trustee, to Barksdale, dated March 15, 1898, under the sale of the property under the joint deed of trust—a joint tenant purchasing the property. The same day Barksdale gave the deed of trust to Roane, trustee, for Hearn for five thousand, five hundred dollars, showing any prudent purchaser this was merely a paper transaction—an effort to get the legal title out of Mrs. Barksdale. into Mr. Barksdale.

“(g) But in this very deed of trust given by Barksdale the very day he bought the property at the foreclosure sale under all of these suggestive facts we find Barksdale describing himself as a ‘widower.’ Surely this was sufficient to excite inquiry and give notice that Mrs. Barksdale was dead.

“(h) And again in the deed of trust made by Barksdale to Roane, trustee, for Hearn & Co., a short time afterwards, dated April 25, 1898, for five thousand, five hundred dollars, very likely made to correct error in the deed of trust of March 15, 1898, Barksdale is described as a ‘widower.’ ”

 APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

license, and went to his home in an adjoining county, a considerable distance from where the court was being held, and all of his witnesses were released from their subpoena under the agreement of marriage, and he was arrested in less than 24 hours after his release, upon the report of the father of the girl that accused had not executed his agreement and that he (the father) believed accused was attempting to get a continuance of the case without executing his agreement and accused was put on trial immediately without a single witness and before he had an opportunity to obtain counsel. In such case it was reversible error to refuse accused request for sufficient time to prepare a formal application for a continuance of the trial to a later day of the term, since it did not appear that accused declined to execute the agreement or that he was acting in bad faith and the fact that the day of his trial was the last day in which the judge intended to devote to criminal business though not the last day of the term was immaterial. *Shows v. State*, 731.

 15. *Insurance. Action. Interest.*

Where, on account of insured's unexplained disappearance, suit upon his life insurance policy, was not brought until after the expiration of seven years from such disappearance, and his policy provided for payment on "receipt and approval of proofs of death" of insured, and the jury found the death occurred on the day of disappearance, it was error to allow plaintiff the beneficiary to recover interest from the day of disappearance on the amount of the policy and premiums paid by insured before such disappearance, there being no receipt and no approval, and no proper rejection of proofs of death, until the filing of the suit, interest on such policy was only recoverable from the time when suit was brought. *Life Ins. Co. v. Brame*, 828.

 16. *Criminal law. Argument or prosecution. Invoking race prejudice.*

Where a negro was being prosecuted for selling whisky and the only witness for the state was a white man, it was reversible error for the district attorney to state to the jury, "it is just a question whether or not you believe this negro or the white witness," naming him, and his retort when appellant's counsel objected, to further say "she is a negro; look at her skin; if she is not a negro I don't want you to convict her" where the court when appealed to, did not rule on the objection but merely said, "well what is she." *Moseley v. State*, 854.

See INITIATIVE AND REFERENDUM.

 APPEARANCE—ATTORNEY'S FEES.

APPEARANCE.

Special appearance. Plea to jurisdiction. Statute. Injunction. Notice of writ. Necessity. Injunction against suit in another state. Courts. Comity. Judgment. Collateral attack.

Under Code 1906, section 3946, so providing when a defendant appeared for the purpose of pleading to the jurisdiction of the court it then and there entered its appearance for all purposes, and by such action was only entitled to a continuance of the suit to the next term of court upon its motion. *Fisher v. Ins. Co.* 30.

ASSESSMENT.

Constitutional law. Drains. Notice. Due process of law. Confirmation. Venue. Power of Drainage commissioners.

Act 1912, chapter 196, section 1698, expressly provides that the commissioners of a drainage district may make a new assessment of the benefits to be derived by each separate tract of land, and raise revenue therefrom according to the provisions of the law. *Simmons v. Drainage Dist.*, 200.

See NOTICE.

ATTACHMENT.

Subjection of property to creditors. Possession. Traders. Boarding house keeper.

A woman keeping a restaurant and boarding house does not belong to the genus "trader" and hence Code 1906, section 4784, relating to the liability of persons transacting business as "traders" has no application to her business. *Oliver v. Ferguson & Allen*, 521.

ATTORNEY'S FEES.

1. *Garnishment. Contested answer. Statute.*

Under section 2361, Code 1906, which provides that "A garnishee shall be allowed for his attendance, provided he shall put in his answer within the time prescribed by law, the pay and mileage of a juror, and in exceptional cases rendering it proper, the court may allow the garnishee reasonable compensation additional to the foregoing" etc., a garnishee will not be allowed attorney fees for defending his answer when contested and where he fails to put in his answer in time will be allowed no compensation whatever. *Shoe Co. v. County Bank*, 315.

2. *Garnishment. Statutes.*

Code 1906, section 2361, which permits the court in exceptional cases rendering it proper, to allow to the garnishee reasonable compensation in addition to *per diem* and mileage, does not permit the allowance to him of an attorney's fee for defending

 BAIL—BANKS AND BANKING.

ATTORNEY'S FEES—Continued.

an issue made by a traverse of his answer and it is immaterial whether or not the answer was filed within the time allowed by law. *Jones Shoe Co. v. Bank*, 650.

BAIL.

Admission to bail. Evidence.

A party charged with homicide should be admitted to bail where the proof is not evident nor the presumption great and his health has been impaired by confinement in jail and because he has been denied a hearing on account of the term of court at which he should have been tried has been pretermitted through no fault of his. *Ex Parte Mormon*, 15.

BANKRUPTCY.

1. *Preferences. Recovery.*

Payments made by an insolvent debtor are not recoverable as preferences, unless, at the time they were made the creditor to whom such payments were made had actual knowledge or constructive notice of the insolvency of the debtor. *Milling Co. v. Powers*, 798.

2. *Preferences. Recovery. Knowledge of agents.*

The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal, the rule falls when the circumstances are such as to raise a clear presumption that the agent will not perform this duty, and accordingly where the agent is engaged in a transaction, in which he is interested adversely to his principal, or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein. *Ib.*

BANKS AND BANKING.

1. *Receiving deposit for insolvent bank. Prosecution. Indictment.*

This indictment for receiving deposits for an insolvent bank knowing or having good reason to believe it insolvent, as set out in the facts of this case, was held by the court sufficient under Code 1906, section 1169, as amended by Laws 1912, chapter 211, dealing with this offense. *State v. Bridgforth*, 221.

2. *Collections. Relation between bank and depositor for collection. Duty to collect in money. Time of payment. Failure to collect. Notice.*

The collecting bank is the agent of the depositors of the claims for collection and it is the duty of such collecting bank to collect in money. *Bank of Shaw v. Ransom*, 440.

BILLS AND NOTES.

BANKS AND BANKING—Continued.

3. *Same.*

A collecting bank cannot extend the time of payment. *Ib.*

4. *Collection. Failure to collect. Notice.*

A collecting bank must use diligence to protect parties who intrust them with the collection of commercial paper; and such bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customers of such vital condition, and fails to take vigorous methods under the circumstances to secure payment, and if loss occurs by its negligence to exercise that degree of skill, care and diligence which the nature of its undertaking calls for, with reference to the time, place and circumstances surrounding the undertaking, it will incur liability to its principal for the loss sustained. *Ib.*

5. *Insolvency. Claims. Guaranteed deposits.*

On the insolvency of a bank the deposits of which are guaranteed under the state banking law (Laws 1914, chapter 124), a depositor has a claim for the full amount of his deposits, undiminished by a check against such deposits for sight exchange, on which sight exchange payment was refused on account of insolvency and liquidation proceedings of the bank, in the absence of proof by the liquidators that the sight exchange was in fact accepted as payment of the checks. *Bank Examiner v. Owen*, 476.

BILLS AND NOTES.

1. *Construction. Maturity. Conflicting clauses. Time of maturity. Reasonable time.*

Where a promissory note read, "one year after date I promise to pay" a certain sum but also providing that, "It is understood and agreed that this note is to be paid whenever" certain land of the maker should be sold, and a deed of trust securing such note provided that, "payment of the note is not to be made until the maker of the note has sold and collected for eighty acres or more of the land." In such case the note and the deed of trust are to be construed together and such note was not payable in one year after date, but when the contingency stated happened. *Hughes v. McEwen*, 35.

2. *Construction. Time of maturity. Reasonable time.*

A purchase money note payable when a given part of the land purchased should be resold by the purchaser is payable after a reasonable time has elapsed for the making of such sale. *Ib.*

BILLS AND NOTES.

BILLS AND NOTES—Continued.

3. *Maturity. Reasonable time.*

Where such note was not paid for four years, a sale under a deed of trust securing the note will not be enjoined on testimony showing that the debtor had made some effort to sell the land, but there was no showing that exceptional circumstances prevented the making of the sale during the four years. *Ib.*

4. *Transfer. Bona-fide purchaser. Defenses.*

Where defendants gave their promissory note payable to bearer for the purchase price of a stallion, in a suit on said note by a bona-fide purchaser thereof for value without notice, the defendants cannot set up as a defense that there was a failure of consideration, in that the stallion did not measure up to the guaranty of his procreating qualities, or that the seller of the stallion was a "vendor of horses" at the time he sold to appellees the stallion in question and had not paid a privilege tax to carry on the business of "vendor of horses" in this state and that therefore the contract as evidenced by the note was void. Since in such case our anti-commercial statute, Code 1906, section 4001, does not apply. *Huddleston v. McMillan Bros.*, 168.

5. *Negotiability. Note payable to bearer. Bona-fide purchaser. Presumption. Defenses. Payment to person not in possession. Estoppel. Failure to assert title. Pleading. Necessity.*

A note payable to bearer is a negotiable instrument to which the title passes by a delivery of the note and the holder is presumed *prima facie* to be the bona-fide owner of it. *Silvey v. Williamson*, 276.

6. *Same.*

Where there was no evidence as to when or how a vice president of a bank secured possession of a note payable to the bank or bearer in a suit by him upon the note, it was error to give a peremptory instruction for the defendant on proof of payment to the bank. *Ib.*

7. *Defenses. Payment to person not in possession.*

Payment of a note payable to bearer, to a person not in possession of the note is at the risk of the payer. *Ib.*

8. *Estoppel. Failure to assert title. Bona-fide purchaser.*

If the vice president of a bank claiming to be the owner of a promissory note was present at the time of the payment of the note by the payer to the bank and knew and understood what was going on, then it was his duty, certainly as an officer of the bank to have explained the true situation to the payer and failing to do so, he would be estopped from maintaining a suit on the note against the payer. *Ib.*

BOARDING HOUSE KEEPER—BONDS.

BILLS AND NOTES—Continued.

9. *Payment. Officer. Paper.*

An officer of a bank has a right in good faith to buy its negotiable paper for a valuable consideration and a payment to the bank after such purchase does not relieve the payer from liability to the officer. *Ib.*

BOARDING HOUSE KEEPER.

Attachment. Subjection of property to creditors. Possession. Traders.

A woman keeping a restaurant and boarding house does not belong to the genus "trader" and hence Code 1906, section 4784, relating to the liability of persons transacting business as "traders" has no application to her business. *Oliver v. Ferguson & Allen*, 521.

BONDS.

1. *Counties. Election. Notice. Publication. Statutes. Title. Sufficiency of title. Appeal and error.. Review. Questions to be decided.*

Chapter 174, Laws 1916, which is an amendment to chapter 176, Laws 1914, does not require any publication of the intention of the board of supervisors to issue road bonds, where the petition presented shows that the proposed bond issue is in excess of five hundred thousand dollars; when the bond issue is to be in excess of five hundred thousand dollars the board of supervisors is by the statute required to order an election to ascertain the will of the qualified electors of the county. *Rosenstock v. Board of Sup'rs*, 124.

2. *Counties. County bonds. Notice. Publication.*

Where the notice of an election for a road bond issue, was the publication in newspapers of the county, for four weeks of the order of the board of supervisors calling the election and also the publication for the same length of time of the notice of the election given by the election commissioners of the county, the law was fully complied with. The statute does not prescribe any specific form of notice and such publication of notice fully advised the electors of the proposed elections. *Ib.*

3. *Counties. Statutes. Sufficiency.*

Since Laws 1914, chapter 176, section 11, requires the consent of the taxpayers themselves to the issuance of bonds for road taxes, the act is not subject to attack on the theory that bonds might be issued to such an amount that they would become confiscatory, for taxpayers if sane would not consent to such confiscation, and the courts are not bound to protect them from their folly. *Ib.*

BONDS.

BONDS—Continued.

4. *Counties. Limitations.*

Section 331, Code 1906, relating to issuance of bonds by the board of supervisors, prohibits the issuance of bonds to an amount which added to all of the bonded indebtedness of a county shall exceed five per cent. of the assessed value of the taxable property appearing on the assessment roll. Laws 1914, chapter 176, as amended by Laws 1916, chapter 174, authorizes the issuance of highway bonds on a vote of the qualified electors without limitation. These two acts are not irreconcilable, since the first imposes limitation on the powers of the board of supervisors, while the latter merely authorizes the taxpayers to tax themselves. *Id.*

5. *Counties. Highways. Improvement. Powers of supervisors. Statutes.*

Chapter 177, Laws 1916, provides an additional method to the present method of working public roads of any county or beat, it furnishes an entirely separate and distinct method from that provided by Code 1906, section 333, and the only limitation on the right of the board to issue such road bonds, is that the bond issue shall not exceed five per centum of the assessed valuation of the real and personal property of such district, exclusive of outstanding bonds. *Ellis v. Donnell*, 129.

6. *Appeal and error. Insufficient amount. New bond.*

Where an appeal bond was defective because the penalty was too small, it was not a nullity and the appellant under Code 1906, section 92, so providing, had the right to file a new bond. *Thorson v. Ill. Cent. R. Co.*, 139.

7. *Counties. Road bonds. Notice. For three weeks next preceding.*

Notice by a board of supervisors of its intention to issue bonds of a road district, was not published as required by Laws 1910, chapter 149, section 2, which requires that the notice shall be published for "three weeks next preceding the meeting at which the board proposes to issue bonds," where more than one week intervened between the last publication and the day fixed for the proposed action of the board, although notice was published for three consecutive weeks. *Lay v. Shores*, 140.

8. *Insurance. Fidelity insurance. Construction.*

A provision in an employee's fidelity bond, that the bond should be invalid, unless signed by the employee, is a valid provision and binding unless the surety company has waived this provision or committed some act whereby it is estopped to claim immunity from liability under this condition of the bond. *Surety Co. v. Rieves*, 747.

 BURDEN OF PROOF—CANCELLATION OF INSTRUMENTS.

BONDS—Continued.

9. *Fidelity insurance. Signatures by principal. Waiver.*

A written application by an employee for an employee's fidelity bond, which expressly stipulated that he would reimburse the bonding company for any loss sustained by it on account of the bond, did not constitute a waiver on the part of the company of the provision in the bond, that it would be invalid unless signed by the employee since the bonding company was not compelled to make the bond at all and it had the right to set forth in the bond the terms upon which it would be liable for the honesty of the employee. *Ib.*

10. *Employee's fidelity insurance. Signature by principal. Waiver.*

Where a bonding company did not know that the principal had failed to sign an employees fidelity bond issued by it, until after it was notified of the default, of the principal, when it at once notified the employer that it denied liability because of the failure of the principal to sign, although one renewal payment had been made to the company previous to this time, such facts did not constitute a waiver nor estop the bond company from setting up the defense that the principal did not sign the bond. *Ib.*

11. *Same.*

Where a bonding company did not learn that the principal had failed to sign the bond until after a default and no further premiums were paid, it was sufficient to tender the collected premium for the first time in court. *Ib.*

BURDEN OF PROOF.

Quieting title. Wills. Estates created. Life estate. Construction.

Complainants filing a bill to remove cloud from title, bear the burden of their bill and must necessarily prevail upon the strength of their own title, and not upon the weakness of the title of their adversary. *Hale v. Neilson*, 291.

See EVIDENCE.

CANCELLATION OF INSTRUMENTS.

Suit to cancel deed. Suggestion.

In a suit to cancel a deed absolute in form, on the theory that it was intended as a mortgage, where defendant filed a cross-bill averring that he was the landlord of complainants and that they were indebted to him for rent for a year, and that he believed that they would remove the agricultural products from the leased premises, unless sufficient goods were distrained, it was within the discretion of the chancellor to issue a writ of sequestration to

CARRIERS.

CANCELLATION OF INSTRUMENTS—Continued.

seize sufficient crops to cover the amount of the rent, upon cross-complainants procuring a sufficient bond to indemnify complainant. *McGehee v. Weeks*, 483.

CARRIERS.

1. *Trial. Assuming facts. Passengers. Action. Instructions. Carrying beyond destination. Punitive damages.*

In an action for damages against a street railway company for carrying plaintiff beyond her destination, an instruction that it was the duty of defendant to keep a lookout for signals, to stop its cars at all regular crossings on the usual signal, and if the jury believed that the agents of defendant did not stop when signalled by plaintiff, but carried her beyond and did not back when requested to do so, plaintiff was entitled to recover damages suffered thereby, was erroneous in assuming that the signal was properly given and recognized. *Light & Traction Co. v. Taylor*, 60.

2. *Same.*

This instruction was also erroneous in placing upon the defendant the absolute duty to back its car for half a block when a passenger is carried beyond his destination. *Ib.*

3. *Passengers. Carrying beyond destination. Punitive damages.*

The language of defendant's conductor in refusing to back the car at the request of plaintiff's mother, when he said, "No, you will get off right here" and also his statement that he "did not have time" in a rough tone was not sufficient to constitute an insult, justifying an award of punitive damages. *Ib.*

4. *Actions for injuries. Negligence. Punitive damages.*

Gross negligence cannot be built up by the addition of two acts of simple negligence. *Ib.*

5. *Live stock. Time for claiming damages. Consideration. Courts. Rule of decision. Waiver.*

Where two different rates were offered by a railroad to a shipper and the shipper accepted the lower rate, this was a sufficient consideration for a clause in the contract of shipment requiring the shipper to make claim within ten days from the date of delivery for any damages. *Railway Co. v. Davis & Co.*, 119.

6. *Live stock. Claim of loss. Time. Reasonableness.*

A provision in a contract of shipment of live stock, requiring the shipper to make claim for damages for loss within ten days from the delivery of the car of stock, when supported by a consideration is valid and reasonable. *Ib.*

CARRIERS.

CARRIERS—Continued.

7. *Live stock. Claim of loss. Waiver.*

Where a shipper of live stock, under a contract requiring that notice of loss should be filed within ten days after delivery did not file a written notice of his claim with any proper agent of the carrier as required by the contract, but orally mentioned the damages or loss to a traveling freight agent of the railroad, who had no authority to receive such notice nor deal with such matters. In such case there was no waiver by the carrier of the requirements of the contract and the shipper was precluded from recovery. *Ib.*

8. *Shipping. Special contract. Offer. Acceptance. Indefiniteness.*

Where in response to an inquiry asking the ocean rates on cast iron pipe from Gulfport to Colon, the agent of a railroad not engaged in ocean transportation quoted a rate on five thousand tons; this at most was only an offer which required acceptance to become binding. *Railroad Co. v. Pipe & Foundry Co.*, 141.

9. *Shipping. Special contract. Indefiniteness.*

A contract simply for a certain ocean freight rate on a certain number of tons, not only does not allow division of the shipment but is too indefinite to allow the shipper to demand transportation by steam, rather than a sailing vessel, and shipment and delivery at any certain date. *Ib.*

10. *Discrimination. Justification. Previous contracts.*

The law is well settled by both federal and state courts, that contracts for interstate transportation at special rates, although entered into before the enactment of a law forbidding discrimination in freight rates, becomes void upon the enactment of such a statute. *Planting Mill Co. v. Railroad Co.*, 148.

11. *Special damages. Notice to carriers.*

Where a cotton buyer of limited means and credit had purchased forty-seven bales of cotton to fulfill his contract for future delivery of one hundred bales, when he shipped the forty-seven bales, informed the railroad agent that he was loaded up with one hundred and fifty bales on hand and that if he did not get the forty-seven bales shipped through immediately he would be blocked from doing any further business; this was not sufficient notice to the railroad company to warrant his recovery against it for delay in delivery, special damages on account of the suspension of his business for twenty days for want of finances and credit, because of his inability to move out the cotton he had on hand his line of credit being exhausted. *Railroad Co. v. Jacobson*, 158.

CARRIERS.

CARRIERS—Continued.

12. *Same.*

In order to recover special damages from a carrier for delay in shipment, it ought to clearly and certainly appear that at the time of the making of the contract of shipment, the railroad company had reasonable notice of the special circumstances rendering such damages the natural and probable result of the delay in the delivery of the shipment. *Id.*

13. *Ejection of passenger. Demand for fare.*

Where an ignorant negro woman boarded a railroad train with an order for a ticket sent her by her husband which resembled a ticket and which she ignorantly believed to be a ticket was put off by the conductor after taking up the order and without first demanding that she pay her fare or get off at a station and buy a ticket, the railroad company was liable in damages, since she was a passenger acting in good faith. *Jones v. Railroad*, 283.

14. *Live stock carriers. Injuries to stock. Claim for damages. Time of filing. Waiver.*

Where the owner making an interstate shipment of live stock shipped them under a bill of lading, providing that as a condition precedent to recovery for injuries to the stock, the shipper should give notice in writing of the claim to a general officer or the nearest station agent, before removing the stock from the cars or from the place where it was unloaded, within twenty-four hours after the stock reached the place of destination, a substantial and not a literal compliance with the terms of the contract is all that would be required in any case, and the benefit of this provision could be waived by the station agent of the carrier. *Railroad Co. v. Wood*, 614.

15. *Same.*

Under such a bill of lading, where the very station agent who by the contract was authorized to accept the written notice assured the shipper that he would have sufficient time to propound his claim, and such agent assisted the shipper in unloading the car and in making an examination of the live stock, their injuries, general condition and the apparent damage to the entire shipment, and taking the expense bill himself, made a written notation thereon of the damage which he personally observed and signed his name thereto. In such case the requirement for written notice was waived and the shipper could recover the damage he sustained. *Id.*

See RAILROADS.

 CERTIORARI—CODE 1906.

CERTIORARI.

See JUDGMENT.

CHattel MORTGAGES.

Trust deeds. Liability of third persons.

Under the facts set out in this case the court held that the question of liability of defendant was a question for the jury. *Maris v. Levy*, 77.

CIRCUIT JUDGE.

Removal of stenographer. Term of office.

Under chapter 135, Code 1906, providing for the appointment of court stenographers, the circuit judge cannot arbitrarily remove his stenographer, he being a public officer and holding for a term of four years. *Ex parte Brown*, 236.

CODE 1906.

- § 40. Municipal corporations. Ordinances. Appeal. Questions of law. *City of Jackson v. Harland*, 41.
- § 92. Appeal and error. Bond. Insufficient amount. New bond. *Thorsen v. Ill. Cent. R. Co.*, 139.
- Ch. 135. Circuit judge. Removal of stenographer. Term of office. *Ex parte Brown*, 236.
- § 331. Counties. Bonds. Limitations. *Rosenstock v. Board of Sup'rs*, 124.
- § 333. Counties. Highways. Improvement. Powers of supervisors. Statutes. *Ellis v. Donnell*, 129.
- § 346. Counties. Officers. Liability for illegal acts. Who may sue. *Weissinger v. Davis*, 625.
- § 700. Costs. Jury tax. Statutes. *Railroad Co. v. Mitchell*, 560.
- § 802. Judgment. Nunc pro tunc. Power to enter. Conflicting with former judgment. *Edwards v. Railroad*, 791.
- § 935. Corporations. Foreign corporations. Filing charter. Statute. Now doing business within the state. Construction. Retroactive effect. *Power v. Mortgage Co.*, 319.
- § 954. Cost. Liability of successful party. Jury tax. Statutes. *Railroad Co. v. Mitchell*, 560.
- § 1137. Forgery. Indictment. Sufficiency. Statute. *State v. Ellis*, 503.
- § 1234. Abortion. Criminal prosecution. Instruction. *Smith v. State*, 802.
- § 1235. Indictment and information. Negating exceptions. Necessity. *Id.*
- § 1264. Trespass. Trespass less than larceny. Taking hog. Statute. *Husbands v. State*, 17.

CODE 1906.

CODE 1906—Continued.

- § 1401. Criminal Law. Appeal. Reversal. Proof of Venue. *Hull v. State*, 375.
- § 1483. Criminal law. Trial. Swearing jurors. *Id.*
- § 1508. Criminal law. Variance. Objection. Waiver. *Smith v. State*, 248.
- § 1573. Criminal law. Prosecution. Repeal of law. *State v. Widman*, 1.
- § 1648. Descent and distribution. Law governing. Personality. Statute. *Neblett v. Neblett*, 550.
- § 1700. Constitutional law. Drains. Assessments. Notice. Due process of law. Confirmation. Venue. Power of drainage commissioners. *Simmons v. Drainage Dist.*, 200.
- § 1797. Intoxicating liquors. Possession with intent to sell. Evidence. Sufficiency. *Washington v. City of Jackson*, 171.
- § 1827. Ejectment. Pleading. Variance. Statute. *Smith v. Whittington*, 759.
- § 1914. Pleading. Duplicity. Surplusage. Action on life insurance policy. Death. Presumption. Fine. Statute. *Life Ins. Co. v. Brame*, 828.
- § 1944. Discovery. Notice. Sufficiency. Statute. *Surety Co. v. Rieves*, 747.
- § 1950. Descent and distribution. Law governing. Personality. Statute. *Neblett v. Neblett*, 550.
- § 2052. Allowance to widow. Priority. Judgment lien. *Bank v. Donald*, 681.
- § 2106. Executors and administrators. Probating claim. Affidavit. Statute. *Persons v. Griffin*, 643.
- § 2206. Counties. Compensation of officers. Auditor. Statutes. Construction. *Revenue Agent v. Browns*, 665.
- § 2300. Gaming. Dealing in futures. Recovery. Statutes. *Cohn v. Brinson*, 348.
- § 2302. Gaming. Money lent or advanced. Recovery. Statutes. *Id.*
- § 2361. Garnishment. Contested answer. Attorney's fee. Statute. *Shoe Co. v. County Bank*, 315.
- § 3097. Action on life insurance policy. Limitations. *Life Ins. Co. v. Brame*, 828.
- § 3101. Municipal corporations. Ordinances extending limits. Appeal statute. *Gregory v. City of Amory*, 604.
- §§ 3303, 3304. Municipal corporations. Ordinances extending limits. Appeal statute. *Id.*
- § 3412. Municipal corporations. Street improvement. Notice. *Bryan v. City of Greenwood*, 718.
- § 3894. Contracts. Validity. Non-payment of tax. Bills and notes. Transfer. Bona fide purchaser. Defenses. *Huddleston v. McMillan Bros.*, 168.

 COMMERCE.

CODE 1906—Continued.

- § 4001. Bills and notes. Transfer. Bona-fide purchaser. Defenses. *Id.*
- § 4750. Statutes. General and special acts. Taxation. *Johnson v. Reeves & Co.*, 227.
- § 4800. States. Actions. Liabilities to suit. *Land Commissioners v. Ford*, 678.
- § 4936. Criminal law. Trial. Swearing jurors. *Hill v. State*, 375.
- §§ 5090, 5091. Wills. Bequest. "Religious or ecclesiastical corporation or association. *Halley v. McLaurin's Estate*, 706.

COMMERCE.

1. *Interstate commerce. State police regulations. Separation of races. Constitutional law. Due process of law.*

Our state statute requiring railroads to provide equal but separate pullman accommodations for the white and colored races by providing two or more cars for each train or by dividing the cars so as to secure separate accommodations, where the number of negro passengers in pullman cars is so small as to be negligible, and where the expense of installing accommodations for the two races would be large, is valid as a reasonable police regulation of the state, is not confiscatory and is not a taking of property without due process of law, and it may be enforced as to both intrastate and interstate passengers, regardless of the additional expense imposed upon the common carrier in complying with it. *Railway Co. v. Norton*, 302.

2. *Exclusive power of congress. Interstate Commerce Commission authority. Evidence. Presumption. Compliance with law. Telegraphs. Action for failure to deliver. Damages for mental suffering. Punitive damages. Federal law.*

By Act of Congress, June 8, 1910, chapter 309, 36 Stat. 539, amending Interstate Commerce Act, Feb. 4, 1887, chapter 104, 24 Stat. 379, making telegraph companies common carriers within the meaning and subject to the provisions of the interstate commerce act, congress has taken possession of the field of interstate commerce by telegraph, and it results that the power of the state to legislate with reference thereto has been suspended. *Telegraph Co. v. Showers*, 411.

3. *Interstate. Commission. Authority.*

As to whether a stipulation on a telegraph blank limiting the telegraph company's liability to fifty dollars, in the absence of greater expressed valuation of the message, is reasonable or unreasonable, valid or void, is a matter to be determined by the Interstate Commerce Commission and not by the state courts

 COMMISSION—CONSTITUTION 1890.

COMMERCE—Continued.

and even if such stipulation ought to be unenforceable, nevertheless the state courts cannot so decide it. *Id.*

4. *Evidence. Presumption. Compliance with law.*

Where there is no evidence to the contrary, the presumption is that an interstate carrier has complied with the federal laws. *Id.*

5. *Interstate. Telegraphs. Action for failure to deliver. Damages for mental suffering.*

Since Congress has assumed control of interstate telegraph business by Act Cong. June 18th, 1910, amending interstate commerce Act Feb. 4th, 1887, making telegraph companies common carriers within the act, the federal rule denying recovery for damages for mental suffering, alone governs in suits for damages from delay in delivering an interstate telegram. *Id.*

See DAMAGES.

COMMISSION FORM OF GOVERNMENT.

See MUNICIPAL CORPORATIONS.

COMITY.

See JURISDICTION.

CONFLICT OF LAWS.

See JURISDICTION.

CONGRESS.

Commerce. Exclusive power of. Interstate Commerce Commission authority. Evidence. Presumption. Compliance with law. Telegraphs. Action for failure to deliver. Damages for mental suffering. Punitive damages. Federal law.

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CONSTITUTION 1890.

- § 7. Constitutional law. Municipal corporations. Due process of law. Notes. Special assessments. Statutes. *Bouslog v. City of Gulfport*, 184.
- § 26. Statute. Partial invalidity. *Hatten v. Bond*, 590.

 CONSTITUTIONAL LAW.

CONSTITUTION 1890—Continued.

- § 61. Statutes. Amendment. Constitutional provisions. "To be amended as follows." *Bryan v. City of Greenwood*, 718.
- § 87. Statutes. General and special acts. Taxation. *Johnson v. Reeves & Co.*, 227.
- § 90. Statutes. Local and special acts. Highway improvements. Powers of board. *Robertson v. Board of Sup'rs*, 54.
- § 90. Statutes. General and special acts. Taxation. *Johnson v. Reeves & Co.*, 227.
- § 100. Statutes. General and special acts. Taxation. *Ib.*
- § 112. Taxation. "Ownership." "Privilege." "Property." "Right of ownership." Value. Statutes. Validity. Privilege tax. By value. *Thompson v. Kreutzer*, 165.
- § 112. Animals. Tax or license. Constitutional provisions. Equal protection of the law. Dog tax. Evidence. Judicial notice. Ex post facto law. Imprisonment for debt. Repeal of law. *State v. Widman*, 1.
- § 112. Taxation. Equality. Property tax. Constitutional provisions. *Thompson v. McLeod*, 383.
- § 112. Taxation. Refrigerating cars. Earnings. Constitutional provisions. Special mode of valuation and assessment. *Packing Co. v. Stovall*, 106.
- §§ 269, 270. Wills. Bequest. "Religious or ecclesiastical corporation or association." *Hailey v. McLaurin's Estate*, 706.

CONSTITUTIONAL LAW.

1. *Animals. Tax or license. Constitutional provisions. Equal protection of the law. Dog tax. Evidence. Judicial notice. Ex post facto law. Imprisonment for debt. Repeal of law.*

Laws 1910, chapter 110, providing for a tax of one dollar on every male dog over six months old, and three dollars on every female dog over six months old and leaving it optional with each county whether its provisions shall be put in operation therein, either by the board of supervisors or by an election, does not violate section 112, Constitution 1890, authorizing the legislature to impose a tax upon such domestic animals as from their nature and habits are destructive of other property. Nor does it violate the Fourteenth amendment of the Constitution of the United States, securing to every citizen the equal protection of the law, since while it discriminates between male and female dogs, it applies to every owner of dogs in the same situation. *State v. Widman*, 1.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

2. *Imprisonment for debt. Dog tax.*

The provision of the state Constitution prohibiting imprisonment for debt has reference to debts founded on contract. It has no application to taxes. *Id.*

3. *Ex post facto law. Dog tax.*

Where Laws 1910, chapter 148, providing for a tax on dogs and making it optional with each county whether its provisions should be put in operation therein either by the board of supervisors or by an election, was put in operation in a county by an order of the board of supervisors on February 5, 1914, and defendant was tried under an affidavit charging him with failing to pay a tax on a dog owned by him on February 1, 1914, such a trial was not under an *ex post facto* law, since the law put the tax into immediate operation, and the offense charged was the failing to pay taxes when due and this occurred after the law was put in force. *Id.*

4. *Initiative and referendum amendment retroactive application. Habeas corpus. Appeal. Scope of review.*

Under well-established rules of construction, the initiative and referendum amendment inserted in the Constitution by resolution adopted by the legislature March 29, 1916 (Laws 1916, chapter 159), should not be held to apply to statutes passed prior to its insertion in the Constitution, unless the words thereof admit of no other meaning and since section 3 of the amendment is incapable of having any except a prospective operation, being manifestly designed to apply to statutes thereafter enacted, chapter 103, Laws 1916, being passed prior to the insertion of such amendment is not affected thereby but continued in force from the date of its passage and will so continue until repealed by the legislature. *Ex parte Jones*, 27.

5. *Taxation. Refrigerating cars. Earnings. Constitutional provisions. Special mode of valuation and assessment.*

Such Statute does not contravene either section 112 of our state Constitution or any provision of the Federal Constitution, since by the express provisions of section 112 of our state Constitution the legislature may provide for a special mode of valuation and assessment for corporate property or for particular species of property belonging to persons, corporations or associations not situated wholly in one county, and such statute is a means of imposing a legitimate tax on the rolling stock of a packing company situated and used in the state. *Packing Co. v. Stovall*, 106.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

6. *Same.*

Such tax as equal and uniform as contemplated by section 112, because all property of the same kind is classed for taxation in the same way. *Ib.*

7. *Same.*

Such tax is not invalid as imposing a burden on interstate commerce. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from taxation and since resort to the receipts of property or capital employed in part at least, in interstate commerce, when such receipt or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, such tax is within the taxing power of the state. *Ib.*

8. *Impairing obligation of contracts. Application.*

While the Federal Constitution, article 1, section 10, prohibits any state from passing a law impairing the obligation of contracts, this inhibition does not apply to acts of congress in dealing with interstate matters. *Planing Mill Co. v. Railroad Co.*, 148.

9. *Taxation. By value. Statutes. Validity. Privilege tax.*

Chapter 112, Laws 112, imposes a tax on property and such tax not being in proportion to its value, violates section 112 of the Constitution of 1890, and is void. *Thompson v. Kreutzer*, 165.

10. *Municipal corporations. Due process of law. Notes. Special assessments. Statutes.*

Chapter 128, Laws 1916, being an act to authorize boards of supervisors and the mayor and board of aldermen or other governing bodies of municipalities to erect sea walls, breakwaters, and bulkheads for protection of public roads or streets extending along the beach or shores of any body of water and to lay special assessments on abutting property not to exceed one-half of the cost of construction, and to issue bonds therefor, and empowering the mayor and commissioners of the city to prorate the assessment without any express rule therefor, and which does not provide for notice to owners either personally or by publication, to afford opportunity of hearing on and objection to the assessments, though section 7 of the act permits any person aggrieved by the order of any board to take bill of exceptions to the circuit court for trial on the record without a jury and in the absence of any such provision in the general law, is violative to both the state Constitution providing that no one shall be deprived of property, etc., except by due course of law, and that every person for an injury done him in his lands, etc., shall have a remedy by due course of law and to the similar

 CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

provisions of the Federal Constitution; and the court could not say that the power granted to boards, etc., impliedly carried the right to prescribe the notice to be given nor that the bond issue could be upheld, regardless of the legality of the assessments. *Bouslog v. City of Gulfport*, 184.

11. *Drains. Assessment. Notice. Due process of law. Assessments. Confirmation. Venue. Power of Drainage commissioners.*

Under section 1700, Code 1906, as amended by Laws 1912, chapter 196, section 4, providing that, when drainage commissioners have completed their assessment, they shall file it with the clerk of the chancery court, and that the clerk shall publish a notice at least once a week for two successive weeks of the time set for hearing objections to assessments before the chancellor which time shall not be less than fifteen days or more than thirty days from the time of filing; such a notice is reasonable and valid. *Simmons v. Drainage Co.*, 200.

12. *Same.*

Under said act the chancellor had jurisdiction to hear the cause in any county of his chancery court district, inasmuch as the act provides that he may hear the cause in vacation, and does not provide expressly that such petition shall be heard in the county where the land is located. *Ib.*

13. *Same.*

Act 1912, chapter 196, section 1698, expressly provides that the commissioners of a drainage district may make a new assessment of the benefits to be derived by each separate tract of land, and raise revenue therefrom according to the provisions of the law. *Ib.*

14. *Favoring constitutionality. Legislative power. State revenue agent. Vested rights. Obligation of contract's office. Contract. Statutes. General and special. Taxation. Exemptions. Construction. General rules. Dismissal and non-suit. Grounds. Abatement of statute.*

The power to legislate is vested in the legislature and before the court can strike down an act of the legislature as unconstitutional it must put its hands upon the exact provision of the Constitution which denies to the legislature their power to pass the act, and not only to point out the provision or provisions that are violated, but to hold beyond a reasonable doubt that the act conflicts with such provision of our organic law. *Johnson v. Reeves & Co.*, 227.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

15. *Legislative power. State revenue agent.*

The office of state revenue agent is a legislative and not a constitutional office. The legislature has the unquestioned right at any time to prescribe the duties of this officer or to curtail his power or it may abolish the office altogether. *Ib.*

16. *Same.*

An office is not a contract, and the incumbent has no vested interest in the term, fees, or emoluments thereof. *Ib.*

17. *Statutes. General and special acts. Taxation.*

Acts 1916, chapter 231, amending Code 1906, section 4750, providing that all authority of the state revenue agent to prosecute suits or appeals to assess for taxation an agricultural product are revoked and annulled and that appeals shall abate and be dismissed, is a general law and not in violation of Constitution 1890, section 87, prohibiting special and local laws. *Ib.*

18. *Same.*

Such statute does not exempt property from taxation, levy or sale nor is it intended to create, increase or decrease the fees, salary, or emoluments of any public officer, and is therefore not violative of any of the provisions of section 90 of the Constitution of 1890. *Ib.*

19. *Same.*

Such statute does not violate section 100 of the Constitution since it does not remit, release, postpone or diminish the fixed liability or obligation of any taxpayer. It does not undertake to declare that those who owe past due taxes on agricultural products are or shall be freed from such liability. *Ib.*

20. *Commerce. Interstate commerce. State police regulations. Separation of races. Due process of law.*

Our state statute requiring railroads to provide equal but separate pullman accommodations for the white and colored races by providing two or more cars for each train or by dividing the cars so as to secure separate accommodations, where the number of negro passengers in pullman cars is so small as to be negligible, and where the expense of installing accommodations for the two races would be large, is valid as a reasonable police regulation of the state, is not confiscatory and is not a taking of property without due process of law, and it may be enforced as to both intrastate and interstate passengers, regardless of the additional expense imposed upon the common carrier in complying with it. *Railway Co. v. Norton*, 302.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

21. *Taxation. Equality. Property tax. Constitutional provisions.*

Chapter 110, Laws 1914, entitled, "An act to levy, collect and enforce the payment of an annual privilege tax or occupation fee upon all persons, associations of persons, or business firms and corporations, pursuing the business of extracting turpentine from standing trees" and fixing the tax at one-fourth of one per cent each year for each cup or box, is a property tax and not a privilege tax, and is violative of Constitution 1890, section 112, providing that taxation shall be uniform and equal throughout the state, and that property shall be taxed in proportion to its value. *Thompson v. McLeod*, 383.

22. *Statute. Partial invalidity.*

If section 16 of the Laws 1916, chapter 527, providing that indictments pending in Harrison county should be tried there instead of in Stone county when elected, was violative of constitution of 1890, section 26, as denying a public trial by a jury of the county where the offense was committed, this would not invalidate the whole act providing for the creation of Stone county. *Hatten v. Bond*, 590.

23. *Same.*

Nor does the fact that section 14 of the act require Stone county to execute and complete contracts entered into by Harrison county so far as they affect the territory of Stone county or invalidate the entire act. *Ib.*

24. *Statutes. Amendment. Constitutional provisions. "To be amended as follows."*

Laws 1912, chapter 260, providing that the statutes therein dealt with should "be amended as follows" does not violate section 61 of the Constitution, for the Legislature, by providing that the statutes therein dealt with should "be amended as follows" manifestly intended that they should "be amended so as to read as follows." *Bryan v. City of Greenwood*, 718.

25. *Licenses. Discrimination. Statute. Validity.*

Section 1, chapter 112, Laws 1914, imposing a privilege tax of two thousand dollars upon a money loaning business, where a greater rate of interest than 20 per cent. per annum is charged, is not violative of any provision of the state or federal Constitutions, either because the tax therein provided is imposed only on a business wherein a greater rate of interest than 20 per cent. per annum is charged, or because the tax is imposed only on a business made unlawful by another statute. *State v. Romback*, 737.

CONSTRUCTION OF INSTRUMENTS.

CONSTITUTIONAL LAW—Continued.

26. *Same.*

Liability under section 1, Laws 1914, chapter 112, depends solely on that section and is not affected by the invalidity of other sections of the act, since this section is complete in itself and the act provides that if any section or part of the act shall be held to be unconstitutional or invalid, that fact shall not invalidate any other part of the act. *Id.*

27. *Licenses. Privilege tax. Persons liable. Agent.*

Under Laws 1914, chapter 112, section 1, imposing a privilege tax of two thousand dollars upon money loaning business, where a greater rate of interest than 20 per cent. per annum is charged, the manager and agent of the person conducting the business, who has no interest in the business is not liable for the tax. *Id.*

See CRIMINAL LAW.

CONSTRUCTION OF INSTRUMENTS.

1. *Bills and Notes. Maturity. Conflicting clauses. Time of maturity. Reasonable time.*

Where a promissory note read, "one year after date I promise to pay" a certain sum but also providing that, "It is understood and agreed that this note is to be paid whenever" certain land of the maker should be sold, and a deed of trust securing such note provided that, "payment of the note is not to be made until the maker of the note has sold and collected for eighty acres or more of the land." In such case the note and the deed of trust are to be construed together and such note was not payable in one year after date, but when the contingency stated happened. *Hughes v. McEwen*, 35.

2. *Wills. Presumptions.*

Where every expression in the will manifests an intention on the part of a testator to dispose of all his estate, the presumption arises that he did not intend to die intestate as to any part of it, and his will if possible will be so construed. *Hale v. Neilson*, 291.

3. *Wills. Instrument taking effect at death of grantor.*

Where it is clear from the language of an instrument in the form of a deed that it was the donor's intention that the instrument itself, should not take effect, for any purpose, until after the death of the maker, it must be held to be testamentary in character, and therefore not a deed. *Simpson v. McGee*, 344.

CONTRACTS.

CONTRACTS.

1. *Insurance. Validity of contract. Use of property. Household goods. Valuation. Statute. Items.*

Where a furniture dealer sold and delivered household furniture with a reservation of title to a woman who kept a house of ill fame and thereupon took out a policy of fire insurance to protect his interest in the same, and afterwards took back the furniture under his reserved title and turned it over to another party who left the property in the house in which it was insured under the care of a watchman, and the furniture was burned. In such case the contract of insurance was not vitiated by the fact that the purchaser of the furniture kept a house of ill fame, since the premium paid by the insurer as a consideration of the contract was not connected with such use of the furniture. *Insurance Co. v. Heidelberg*, 46.

2. *Carriers. Live stock. Time for claiming damages. Consideration. Courts. Rule of decision. Federal court decisions. Waiver.*

Where two different rates were offered by a railroad to a shipper and the shipper accepted the lower rate, this was a sufficient consideration for a clause in the contract of shipment requiring the shipper to make claim within ten days from the date of delivery for any damages. *Railway Co. v. Davis & Co.*, 119.

3. *Carriers. Live stock. Claim of loss. Time. Reasonableness.*

A provision in a contract of shipment of live stock, requiring the shipper to make claim for damages for loss within ten days from the delivery of the car of stock, when supported by a consideration is valid and reasonable. *Ib.*

4. *Carriers. Live stock. Claim of loss. Waiver.*

Where a shipper of live stock, under a contract requiring that notice of loss should be filed within ten days after delivery did not file a written notice of his claim with any proper agent of the carrier as required by the contract, but orally mentioned the damages or loss to a traveling freight agent of the railroad, who had no authority to receive such notice nor deal with such matters. In such case there was no waiver by the carrier of the requirements of the contract and the shipper was precluded from recovery. *Ib.*

5. *Shipping. Special contract. Offer. Acceptance. Indefiniteness.*

Where in response to an inquiry asking the ocean rates on cast iron pipe from Gulfport to Colon, the agent of a railroad not engaged in ocean transportation quoted a rate on five thousand tons; this at most was only an offer which required acceptance to become binding. *Railroad Co. v. Pipe & Foundry Co.*, 141.

CONTRACTS.

CONTRACTS—Continued.

6. *Shipping. Special contract. Indefiniteness.*

A contract simply for a certain ocean freight rate on a certain number of tons, not only does not allow division of the shipment but is too indefinite to allow the shipper to demand transportation by steam, rather than a sailing vessel, and shipment and delivery at any certain date. *Ib.*

7. *Carriers. Discrimination. Justification. Previous contracts.*

The law is well settled by both federal and state courts, that contracts for interstate transportation at special rates, although entered into before the enactment of a law forbidding discrimination in freight rates, becomes void upon the enactment of such a statute. *Planting Mill Co. v. Railroad Co.*, 148.

8. *Constitutional law. Impairing obligation of contracts. Application.*

While the Federal Constitution, article 1, section 10, prohibits any state from passing a law impairing the obligation of contracts, this inhibition does not apply to acts of congress in dealing with interstate matters. *Ib.*

9. *Validity. Non-payment of tax. Bills and notes. Transfer. Bona fide purchaser. Defenses.*

Contracts made by a party who has not paid his privilege tax are valid since April 21, 1906, at which time the statute (Ann. Code 1892, section 2401), declaring all contracts made by a party who had not paid his privilege tax void was amended (Code 1906, section 3894) and the legislature omitted from the statute the provision, declaring contracts void when made by a person who had not paid his privilege tax, and the penalty for such failure was made a fine and imprisonment only. *Huddleston v. McMullan Bros.*, 168.

10. *Rewards. Necessity for knowledge of offer.*

A reward cannot be earned by one who did not know it had been offered; for there can be no acceptance of an uncommunicated offer. *Fidelity & Deposit Co. v. Messer*, 267.

11. *Same.*

The publication of an advertisement offering a reward is a general offer to make a contract with any person who is able to perform the required services and meet the conditions of the proposal. The performance of the service or the performance of the condition on which the promise is made, with knowledge, is an acceptance of the offer, and when done concludes the contract. The matter rests exclusively in the domain of contracts involving an offer and its acceptance. *Ib.*

CONTRACTS.

CONTRACTS—Continued.

12. *Sale. Excuse for non-performance. Attempted modification.*

Where a contract for the sale of peas was fully consummated by a telegram from the buyer to the seller and afterwards the buyer wrote to the seller confirming the telegram but asking for a better grade of peas, this was no defense to an action on the contract first made. *Seed Co. v. Rauch*, 330.

13. *Gaming. Futures. Invalidity. "Wager."*

It is settled law that the contract for the purchase and delivery of a commodity in the future and for the payment of the difference in price arising out of the rise and fall in the market above or below the contract price is a wager on the future price of the commodity, and is for that reason void when the real intent of the parties is simply to speculate on the rise and fall of prices and the goods are really not to be delivered. *Cohn v. Brinson*, 348.

14. *Waters and water courses. Municipal water supply. Covenant running with the land. Penalty for violating regulation.*

A contract by a city owning water works to furnish a landowner with water on certain premises, is a covenant running with the land and as long as such owner owned the premises he had a right, while subscribing to reasonable regulations made by the city, to be furnished with water and this right would not be cut off because he was delinquent in the payment of his water rent, though during the time of such delinquency the city had a right to cut off his water supply until the rent in arrears was paid. *Carmichael v. City of Greenville*, 426.

15. *Insurance. Casualty insurance. Action by insured. Reinsurance.*

Where an insurance company contracted with another insurance company whereby it reinsured such other company, which had issued an employers' liability policy to plaintiff for all of its outstanding liabilities, and agreed that any liability or expense under the former company's policies would be assumed and paid, such a contract was more than a contract of reinsurance and was made for the benefit of the insured and the insurance company which did not issue the policy directly to the insured, was also liable to him. *Fire Ins. Co. v. Hand-Jordan Co.*, 565.

16. *Carriers. Live stock carriers. Injuries to stock. Claim for damages. Time of filing. Waiver.*

Where the owner making an interstate shipment of live stock shipped them under a bill of lading, providing that as a condition precedent to recovery for injuries to the stock, the shipper should give notice in writing of the claim to a general officer or the nearest station agent, before removing the stock from the cars

 CONVEYANCES.

CONTRACTS—Continued.

or from the place where it was unloaded, within twenty-four hours after the stock reached the place of destination, a substantial and not a literal compliance with the terms of the contract is all that would be required in any case, and the benefit of this provision could be waived by the station agent of the carrier. *Railroad Co. v. Wood*, 614.

17. *Same.*

Under such a bill of lading, where the very station agent who by the contract was authorized to accept the written notice assured the shipper that he would have sufficient time to propound his claim, and such agent assisted the shipper in unloading the car and in making an examination of the live stock, their injuries, general condition and the apparent damage to the entire shipment, and taking the expense bill himself, made a written notation thereon of the damage which he personally observed and signed his name thereto. In such case the requirement for written notice was waived and the shipper could recover the damage he sustained. *Id.*

18. *Performance. Tender.*

Where in an action for the balance of the contract price for boring an oil well, defendant claimed as a defense that plaintiff had refused to deliver a book kept by him, showing the strata through which he had drilled as he agreed to do, a tender of a copy of such book before suit was a substantial compliance with the contract and a tender of the book itself after suit which defendant refused was a full compliance and plaintiff was entitled to a peremptory instruction for the balance due on the contract. *Tatum v. Garrett*, 767.

19. *Courts. Rules of property. Construction.*

When the supreme court has construed a contract as a lease and not a conditional sale and one of the parties to the action afterwards made a similar contract, the decision became a rule of property binding on such party. *Robertson v. Mfg. Co.*, 890.

CONVEYANCES.

Property conveyed. Actions.

A deed conveying one hundred and seventy-five acres of land more or less, by metes and bounds, does not include three hundred other acres which by accretion had attached to the original tract before the conveyance. *Houston Bros. v. Grant*, 465.

See FRAUDULENT CONVEYANCES.

CORPORATIONS—COSTS.

CORPORATIONS.

1. *Foreign corporations. Filing Charter. Statute. Now doing business within the state. Construction. Retroactive effect.*

The amendatory Act of 1916, chapter 92, does not apply to corporations which had already complied with the law and were thereby lawfully doing business in this state. The act does not by its express terms require a refiling of any charter and the words "now or hereafter doing business in this state," should be interpreted to embrace foreign corporations in fact doing business in this state without having filed their charters, and paid the fees required by section 935 of the Code, and also corporations which should thereafter apply for admission into the state. *Power v. Mortgage Co.*, 319.

2. *Same.*

The passage of chapter 92, Laws 1916, repealed section 935 of the Code and any demand thereafter made by the secretary of state is necessarily based upon the new act. *Ib.*

3. *Same.*

To hold that this section requires corporations which had already complied with the law to refile their charters, would give to the act a retroactive effect and impose an additional burden upon those corporations doing business in this state by invitation and license of this state. *Ib.*

4. *Same.*

A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the legislature. In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their liberal extent to comprehend existing cases. *Ib.*

COSTS.

1. *Justice of the peace. Review. Presumptions. Security. Waiver. Jurisdiction. Default. Judgment. Validity. Damages. Writ of inquiry. Execution. Injunction. Appeal.*

In a suit before a justice of the peace where the defendant made a motion for security for cost and plaintiff's attorney stated that he would be responsible for the cost and no further action was taken upon the motion, and judgment was entered for plaintiff, on appeal to the supreme court from a decree enjoining execution on the judgment, that court will presume that the statement of counsel was accepted by defendant. *Welch v. Hannie*, 79.

COUNTIES.

COSTS—Continued.

2. *Same.*

In such case it was the duty of defendant if he so desired, to have the court to pass upon his motion for security for cost and his failure to do so was a waiver of his rights. *Id.*

3. *Jury tax. Statutes.*

A jury tax of three dollars is a part of the cost of a case under Code 1906, section 700, so providing. *Railroad Co. v. Mitchell*, 560.

4. *Liability of successful party. Jury tax. Statutes.*

Under Code 1906, section 954, making a successful defendant liable for all cost accrued at his instance, and not paid or collected from the other party where no property of plaintiff could be found, a successful defendant is liable for the jury tax of three dollars imposed by section 700 of the Code, since such tax is only imposed where a plea is filed and the defendant by his affirmative act in filing a plea causes the cost to accrue. *Id.*

COUNTIES.

1. *Highways. Improvement. Powers of supervisors. Statutes.*

Chapter 177, Laws 1916, provides an additional method to the present method of working public roads of any county or beat, it furnishes an entirely separate and distinct method from that provided by Code 1906, section 333, and the only limitation on the right of the board to issue such road bonds, is that the bond issue shall not exceed five per centum of the assessed valuation of the real and personal property of such district, exclusive of outstanding bonds. *Ellis v. Donnell*, 129.

2. *Creation. Procedure. Submission to popular vote.*

Under section 260 of the Constitution so providing, no new county can be formed unless a majority of the qualified electors voting in each part of the county or counties proposed to be dismembered and embraced in the new county shall separately vote therefor. *Hatten v. Bond*, 590.

3. *Officers. Liability for illegal acts. Who may sue.*

Under Code 1906, section 346, providing that if a board of supervisors shall appropriate any money to an object not authorized by law, the member of the board who did not vote against the appropriation shall be liable personally for such sum of money, to be recovered by suit in the name of the county, or in the name of any person who is a taxpayer who will sue for the use of the county, and who shall be liable, for cost, the taxpayer's right is fixed by the statute and if the object of the appropriation was lawful the taxpayer's suit must fail, and an averment

COURTS.

COUNTIES—Continued.

in the declaration charging corruption will not confer upon such taxpayer a right to maintain the action. *Weissinger v. Davis*, 625.

4. *Compensation of officers. Auditor. Statutes. Construction.*

Under Code 1906, section 2206, providing that in counties having two judicial districts the officers may be allowed the compensation therein provided for each district, it was the intent of the legislature, that this section should apply to all county officers in the allowance of compensation for their services in counties composed of two judicial districts. The language "compensation herein provided," as used in this section was not intended to be limited to the compensation allowed as fees to those officers named in Chapter 49, Code 1906. *Revenue Agent v. Browns*, 665.

5. *Same.*

In arriving at the spirit and intent of a statute of this kind, it is proper to take into consideration any other statutes in the code relating to the same subject, and if material to each other they should be construed together consistently and harmoniously if possible as one scheme, in order to ascertain the true intent of the legislature in dealing with that particular subject. *Id.*

6. *Same.*

Section 2206, Code 1906 applies to the compensation allowed to county auditors by section 348, Code 1906 and the board of supervisors in counties composed of two judicial districts have the lawful authority, within their discretion to allow the fixed compensation for each district of such counties. *Id.*

See BONDS.

COURTS.

1. *Rules of decision. Federal court decisions.*

In the case of interstate shipments, the rule announced by the federal courts as to the reasonableness of a limitation by contract for the shipment of live stock, of the time within which a claim for loss must be made, will be followed by the state courts. *Railway Co. v. Davis & Co.*, 119.

2. *Rules of decision. Laws of property.*

Where the courts of this state have decided that a land patent was void, because the requirement of the precedent execution of a bond by the statute had not been complied with, such decision established a rule of property, which, will govern subsequent cases involving the validity of such title. *Becker v. Bank*, 819.

COVENANTS—CRIMINAL LAW.

COURTS—Continued.

3. *Rules of property. Contract. Construction.*

When the supreme court has construed a contract as a lease and not a conditional sale and one of the parties to the action afterwards made a similar contract, the decision became a rule of property binding on such party. *Robertson v. Mfg. Co.*, 890.

COVENANTS.

See CONTRACTS.

CRIMINAL LAW.

1. *Prosecution. Repeal of law.*

A prosecution begun under the Laws of 1910, chapter 178, before its repeal could be concluded after the repeal of the statutes since Code 1906, section 1573, so provides. *State v. Widman*, 1.

2. *Appeal. Credibility of witnesses.*

It was the province of the jury to pass upon the credibility of witnesses and the discrepancies in their testimony given at one trial and then at another. It is not for the supreme court to say that witnesses were unworthy of belief. *Wells v. State*, 76.

3. *Presence of accused. Reception of verdict.*

Where in a prosecution for the unlawful sale of intoxicating liquors, after the jury had retired and before their return the court adjourned until the following day, until which time all parties and witnesses were discharged and after adjournment and after accused had left the court room, the jury notified the court that they were ready to report and the court without notice to accused or his counsel received the verdict, finding defendant "guilty as charged." In such case the court's action was reversible error, since it denied accused his constitutional right to be present at every stage of the trial. *Woods v. City of Tupelo*, 132

4. *Presence of accused. Reception of verdict.*

Where in a trial of defendant for keeping liquor for unlawful purposes the jury returned a verdict of guilty to the clerk after court had adjourned for the noon hour and in the absence of the judge the defendant, and her counsel, without any agreement of the defendant or her counsel that the verdict might be returned in such manner, or any agreement whatever with reference to the return of the verdict by the jury and the defendant did not in any way waive her presence when the verdict was returned, the return of the verdict under such circumstances was reversible error as denying to accused, her constitutional right to be present at every stage of the trial. *Hunt v. City of Tupelo*, 178.

 CRIMINAL LAW.

CRIMINAL LAW—Continued.

5. *Instructions. Reasonable doubt.*

An instruction for the state that "by a reasonable doubt is meant not a mere speculative doubt or vague conjecture, mere supposition, or hypothesis, but such a doubt as reasonably arises out of the testimony, a doubt for which a reason can be given," besides being generally objectionable in attempting to define a reasonable doubt, is erroneous in declaring that a reasonable doubt must arise out of the evidence when it may arise also from the want of evidence. *Kelly v. State*, 245.

6. *Variance. Objection. Waiver.*

Where an indictment charged defendant with stealing a cow belonging to several parties, but the evidence showed that it belonged to only one of them who died after it was stolen but before the indictment, leaving the other named owners as his heirs at law, the defendant in order to take advantage of the variance between the allegations and the proof should have objected specifically on that ground, whereupon under Code 1906, section 1508, the indictment could have been amended to correspond with the proof, and defendant failing to do this could not avail himself of such variance on appeal. *Smith v. State*, 248.

7. *Appeal. Error. Examination of juror. Race prejudice.*

Where on a trial of a negro for murder, a juror was asked on his *voir dire*, whether he had any prejudice against the negro as a negro that would induce him to return a verdict on less or slighter evidence than he would return a verdict of guilty against a white man under the same circumstances, it was reversible error not to allow the juror to answer. *Hill v. State*, 260.

8. *Manslaughter. Venue. Sufficiency of evidence. Judicial notice. Municipalities. Existence and general course of railroads. Appeal. Reversal. Trial. Swearing jurors. Exception.*

The court held that under the facts of this case as set out in the opinion that the venue of the crime was established in Wilkinson county. *Hill v. State*, 375.

9. *Judicial notice. Municipalities.*

Courts not only take judicial cognizance of municipalities but of the existence and general course of important railroads. *Ib.*

10. *Appeal. Reversal. Proof of venue.*

Under Code 1906, section 1401, providing that doubt as to the county in which the offense was committed shall not avail to procure acquittal, the supreme court is precluded from reversing a case even though the evidence leaves the venue in doubt. *Ib.*

CRIMINAL LAW.

CRIMINAL LAW—Continued.

11. *Trial. Swearing jurors.*

The failure to specially swear the jury in a capital case, as required by Code 1906, section 1483, was not a jurisdictional defect and must have been taken advantage of before verdict as provided by section 1413, Code 1906, and where a defendant accepted the jury and went to trial on the facts without exception on this ground, such exception could not be first made in a motion for a new trial, since section 4936, Code 1906, provides that no judgment shall be reversed for any defect which might have been taken advantage of before verdict, and which was not then urged. *Id.*

12. *Trial. Court's remarks in selecting jury. Homicide. Admissibility of evidence. Previous uncommunicated threats by decedent. Previous communicated threats. Self defense. Circumstances preceding act. Instructions. Weight of evidence. Ignoring defendant's version.*

Where on a trial for homicide the whole trend of the *voir dire* examination was to influence the proposed jurors against the defendant and to strongly impress them with the idea that their duty was to convict; and each juror was given to understand that he would be a man of very little moral courage unless he found a verdict of guilty, such an examination was erroneous and very prejudicial to the defendant. *Leverett v. State*, 394.

13. *Instructions. Weight of evidence.*

Where on a trial for homicide accused claimed he killed deceased in self defense in a quarrel over deceased's improper relations with accused's wife, an instruction to the jury for the state, to disregard the finding of a letter from accused's wife on decedent's body, was prejudicial error, because on the weight of evidence and because such evidence was important and material evidence as corroborative of defendant's claim of self defense. *Id.*

14. *Instructions. Self defense. Undue prominence.*

Where on a trial for homicide the accused depended alone on the ground of self defense, instructions emphasizing the fact that no other defense was involved, were erroneous as disparaging the testimony regarding the cause of the quarrel. *Id.*

15. *Continuance.*

Where accused was indicted for having carnal knowledge of a previously chaste female younger than himself, and was released on his agreement to marry her, and he procured a marriage license, and went to his home in an adjoining county, a con-

DAMAGES.

CRIMINAL LAW—Continued.

siderable distance from where the court was being held, and all of his witnesses were released from their subpoena under the agreement of marriage, and he was arrested in less than 24 hours after his release, upon the report of the father of the girl that accused had not executed his agreement and that he (the father) believed accused was attempting to get a continuance of the case without executing his agreement and accused was put on trial immediately without a single witness and before he had an opportunity to obtain counsel. In such case it was reversible error to refuse accused request for sufficient time to prepare a formal application for a continuance of the trial to a later day of the term, since it did not appear that accused declined to execute the agreement or that he was acting in bad faith and the fact that the day of his trial was the last day in which the judge intended to devote to criminal business though not the last day of the term was immaterial. *Shows v. State*, 731.

16. *Motion in arrest of judgment. Grounds.*

As "Charity covers a multitude of sins" in the domain of morals, so a verdict of a jury in Mississippi covers a multitude of defects in pleadings; and it is only in cases where the indictment is a nullity, because of insufficiency, that a motion in arrest of judgment can be entertained at all. *Young v. State*, 769.

17. *Trial. Comments of district attorney.*

In a prosecution for attempting to commit an abortion it was reversible error for the prosecuting attorney to comment to the jury on the failure of the defendant to introduce his wife as a witness. *Smith v. State*, 802.

18. *Argument of prosecution. Invoking race prejudice.*

Where a negress was being prosecuted for selling whisky and the only witness for the state was a white man, it was reversible error for the district attorney to state to the jury, "It is just a question whether or not you believe this negro or the white witness," naming him and his retort when appellant's counsel objected, to further say "she is a negro; look at her skin; if she is not a negro I don't want you to convict her" where the court when appealed to, did not rule on the objection but merely said, "well, what is she." *Moseley v. State*, 854.

DAMAGES.

1. *Passengers. Carrying beyond destination. Punitive damages. Carriers.*

The language of defendant's conductor in refusing to back the car at the request of plaintiff's mother, when he said: "No, you

DAMAGES.

DAMAGES—Continued.

will get off right here" and also his statement that he "did not have time" in a rough tone was not sufficient to constitute an insult, justifying an award of punitive damages. *Light & Traction Co. v. Taylor*, 60.

2. *Carriers. Actions for injuries. Negligence. Punitive.*

In order to justify the imposition of punitive damages there must be some willful or wanton wrong or such gross negligence as imputes willful disregard of plaintiff's rights. *Ib.*

3. *Writ of inquiry.*

In an *ex delicto* case there is no necessity for the issuing of a writ of inquiry in a trial before a justice of the peace because under our law, unless a jury is called for, the justice of the peace passes upon the question of liability, and at the same time upon the question of the amount of damages, and it is only necessary when judgment is taken by default to introduce testimony as to the damages. *Welch v. Hannie*, 79.

4. *Carriers. Special. Notice to carriers.*

Where a cotton buyer of limited means and credit had purchased forty-seven bales of cotton to fulfill his contract for future delivery of one hundred bales, when he shipped the forty-seven bales, informed the railroad agent that he was loaded up with one hundred and fifty bales on hand and that if he did not get the forty-seven bales shipped through immediately he would be blocked from doing any further business; this was not sufficient notice to the railroad company to warrant his recovery against it for delay in delivery, special damages on account of the suspension of his business for twenty days for want of finances and credit, because of his inability to move out the cotton he had on hand his line of credit being exhausted. *Railroad Co. v. Jacobson*, 158.

5. *Same.*

In order to recover special damages from a carrier for delay in shipment, it ought to clearly and certainly appear that at the time of the making of the contract of shipment, the railroad company had reasonable notice of the special circumstances rendering such damages the natural and probable result of the delay in the delivery of the shipment. *Ib.*

6. *Telegraphs and telephones. Negligence. Sufficiency of evidence. Punitive. Willful negligence.*

In such case no punitive damages could be recovered, mere brusqueness of an agent not amounting to insult and being no grounds in law for the infliction of punitive damages against his principal. *Telegraph Co. v. Koonce*, 173.

DAMAGES.

DAMAGES—Continued.

7. *Telegraphs and telephones. Mental suffering. Willful wrong.*

No action lies for the recovery of damages for mere mental suffering, disconnected from physical injury and not the result of willful wrong. *Telegraph Co. v. Koonce*, 173.

8. *Railroads. Operation. Noise.*

Where after the construction of defendant's main line of railroad, plaintiff acquired a residence a short distance from the right of way, and thereafter to furnish facilities to a compress company defendant, over its own property, constructed a spur track leading to the compress, and the business done over this spur track was of the same character as that done at regular freight depots, such spur track was installed to serve the general public, and the act of installation must be characterized as a public and not a private act of the railway company. In such case where there was no complaint or proof that smoke, dust, sparks or cinders were projected by defendant's engines and trains over and upon any of plaintiff's property, but the sole ground of complaint was the noise produced by the orderly operation of the cars, the plaintiff could not recover for injuries caused only by the noise, it being a case of *damnum absque injuria*. *Dean v. Railway Co.*, 333.

9. *Interstate commerce. Telegraphs. Action for failure to deliver. Mental suffering.*

Since Congress has assumed control of interstate telegraph business by Act Cong. June 18th, 1910, amending interstate commerce Act Feb. 4th, 1887, making telegraph companies common carriers within the act, the federal rule denying recovery for damages for mental suffering, alone governs in suits for damages from delay in delivering an interstate telegram. *Telegraph Co. v. Showers*, 411

10. *Telegraph. Telephones. Punitive. Federal law.*

Under the Federal Rule the master is not liable for punitive damages unless he participates in the wanton or malicious act of his servant or agent or subsequently ratifies it and this rule applies in a suit for damages from delay in delivering an interstate telegram. *Id.*

11. *Trespass. Elements of. Taking property without legal process.*

Where appellant went upon the premises of appellee over his protest and without having any writ or warrant of any kind from any officer of the law, took possession of a mule he had sold on a conditional contract and thereby frightened appellee's wife, and putting him to expenses in recovering the property, the

DEATH—DEEDS.

DAMAGES—Continued.

jury may consider not only the value of the mule, but all other circumstances in fixing the damage. *Wilson v. Kuykendall*, 486.

12. *Same.*

Under the law a party has not the right to invade the premises of another and take from the possession of the other party by force against the will of the party in possession any property, even though he may have title thereto. He must in such case resort to the courts to obtain possession, if the party in possession refuses on demand to deliver the property. *Id.*

13. *Appeal and error. Disposition of cause. Reward on special issue.*

Under Supreme Court Rule 13, so providing when a judgment is reversed and a new trial ordered because the damages are excessive or inadequate and for no other reason the judgment will be set aside only as to damages and be good in all other respects and where a judgment was reversed because of the refusal of the court below to grant an instruction bearing solely on the measure of damages, and the cause then remanded generally, a motion to correct the judgment so as to remand the case for trial only on the question of damages will be sustained. *Railroad Co. v. Boon*, 493.

DEATH.

Presumption. Fine. Death. Statute.

Under Code 1906, section 1914, creating the presumption of death after seven years unexplained absence the burden of proof is upon the party interested in proving the death at any particular time, since in such case the law raises no presumption as to the precise time of death. *Live Ins. Co. v. Brame*, 828.

DEED OF TRUST.

See DEEDS.

DEEDS.

1. *Mortgage. Deed as mortgage. Parol evidence. Cancellation of instruments. Suit to cancel deed. Relief. Sequestration.*

The grantors of a deed, on the trial of their suit to cancel the deed on the theory that it was intended to be a mortgage or that they were by a separate instrument accorded the right to repurchase, had the right to show by parol evidence that the deed was intended to operate as a mortgage where they remained in possession after the giving of the deed. *McGehee v. Weeks*, 483.

2. *Cancellation of instruments. Suit to cancel deed. Suggestion.*

In a suit to cancel a deed absolute in form, on the theory that it was intended as a mortgage, where defendant filed a cross-bill

DEEDS.

DEEDS—Continued.

averring that he was the landlord of complainants and that they were indebted to him for rent for a year, and that he believed that they would remove the agricultural products from the leased premises, unless sufficient goods were distrained, it was within the discretion of the chancellor to issue a writ of sequestration to seize sufficient crops to cover the amount of the rent, upon cross-complainants procuring a sufficient bond to indemnify complainant. *McGehee v. Weeks*, 483.

3. *Description. Sufficiency.*

Where the description in a land deed was "The land described as the north end of fractional southwest quarter of southwest quarter of section 33, township 18, range 15, containing four acres with the house on it, it sufficiently describes the land. *Harris v. Byers*, 651.

4. *Warranty. Deed of Trust.*

Where a grantor conveys land by warranty deed which at the time was covered by a deed of trust, he cannot acquire title from a sale under such trust deed and set it up against his grantor but the title so acquired inures to his grantee under his warranty deed. *Ib.*

5. *Property Conveyed. Description.*

Where a deed conveyed land described as the north end of the southwest quarter of the southwest quarter of a named section, township and range, containing four acres if the grantor did not own the entire north end of the southwest quarter of the southwest quarter, his conveyance of four acres off the north end of said subdivision would operate to carry four acres of land off the north end of whatever land he owned in said subdivision. *Ib.*

6. *Incapacity. Negligence.*

Where a devisee under a will which was in the custody of another party, saw such will and had full opportunity to familiarize himself with its contents, but failed to read the will through, before deeding to the party having the custody of the will, his interest under the will, and such devisee at the time of making such deed was not drunk or incapable of transacting business, he could not complain of his own negligence in not learning of his interest under the will to set aside and cancel his deed. *Caulk v. Burt*, 660.

7. *Drunkenness of Grantor. Evidence.*

Under the facts set out in the opinion, the court held in this case that the evidence was not sufficient to show that complainant

DEFENSES.

DEEDS—Continued.

was drunk when he executed the deed to his interest as devisee under the will. *Id.*

8. *Wills. Character of instrument. Testament or deed.*

An instrument executed by three brothers who were engaged in the operation of a plantation owned by two of them, which provided that on the death of any one of them, his interest, in the property was to vest in the others, subject only to his personal debts, and that in the event of the death of two of them, the property should vest in the survivor, the expressed purpose being that the business might be carried on without interruption, did not convey to any of the parties thereto any interest in the property of the others, to vest, either immediately or in the future, but the object sought to be accomplished by it was to cause whatever property each of the parties thereto might own at his death, to vest when that event should occur, in the surviving party or parties. The instrument therefore is testamentary in character, and can have no operation as a deed. *Thomas v. Byrd*, 692.

DEFENSES.

1. *Bills and notes. Transfer. Bona-fide purchaser.*

Where defendants gave their promissory note payable to bearer for the purchase price of a stallion, in a suit on said note by a bona-fide purchaser thereof for value without notice, the defendants cannot set up as a defense that there was a failure of consideration, in that the stallion did not measure up to the guaranty of his procreating qualities, or that the seller of the stallion was a "vendor of horses" at the time he sold to appellees the stallion in question and had not paid a privilege tax to carry on the business of "vendor of horses" in this state and that therefore the contract as evidenced by the note was void. Since in such case our anti-commercial statute, Code 1906, section 4001, does not apply. *Huddleston v. McMillan Bros.*, 168.

2. *Bills and notes. Payment to person not in possession.*

Payment of a note payable to bearer, to a person not in possession of the note is at the risk of the payer. *Silvey v. Williamson*, 276.

3. *Bills and notes. Payment. Officer. Paper.*

An officer of a bank has a right in good faith to buy its negotiable paper for a valuable consideration and a payment to the bank after such purchase does not relieve the payer from liability to the officer. *Id.*

DEPOSITS—DISTRIBUTION.

DEFENSES—Continued.

4. *Contracts. Performance. Tender.*

Where in an action for the balance of the contract price for boring an oil well, defendant claimed as a defense that plaintiff had refused to deliver a book kept by him, showing the strata through which he had drilled as he agreed to do, a tender of a copy of such book before suit was a substantial compliance with the contract and a tender of the book itself after suit which defendant refused was a full compliance and plaintiff was entitled to a peremptory instruction for the balance due on the contract. *Tatum v. Garrett*, 767.

See NEGLIGENCE; SELF-DEFENSE.

DEPOSITS.

Banks and banking. Insolvency. Claims. Guaranteed deposits.

On the insolvency of a bank the deposits of which are guaranteed under the state banking law (Laws 1914, chapter 124), a depositor has a claim for the full amount of his deposits, undiminished by a check against such deposits for sight exchange, on which sight exchange payment was refused on account of insolvency and liquidation proceedings of the bank, in the absence of proof by the liquidators that the sight exchange was in fact accepted as payment of the checks. *Bank Examiner v. Owen*, 476.

DESCENT AND DISTRIBUTION.

Law governing. Personality. Statute.

Under Rev. Code 1871, section 1950 (Code 1906, section 1648), declaring that personal property within the state shall descend and be distributed according to the laws of this state notwithstanding the domicile of the deceased may have been in another state, the descent of a leasehold interest in school land situated in this state is controlled by the laws of this state notwithstanding the domicile of deceased may have been in another state and under Code 1906, section 5081, which avoids the lapse of legacies on the death of the legatee during the lifetime of the testator only when the legatee left a child surviving, a legacy of such leasehold interest will lapse on the death of the legatee without children, though it would not lapse under the statute of the state where the testatrix was domiciled. *Neblett v. Neblett*, 550.

DISCOVERY—DIVORCE.

DISCOVERY.

Notice. Sufficiency. Statute.

Under section 1944, Code 1906, providing that if witnesses whose testimony is to be perpetuated are within the state, notice of the filing of a statement touching the matter as to which such testimony is desired, the names of the witness to be examined, the time and place of taking this testimony, shall be given to those represented in the statement as adverse parties in interest, a notice that a corporation through its officers "are required to answer, as provided by this section the following interrogatories," was not a proper notice and in such case neither the corporation nor its counsel was thereupon called upon to answer such interrogations under section 1938, which relates to obtaining the testimony of a nonresident party. *Surety Co. v. Reeves*, 747.

DISMISSAL AND NONSUIT.

1. *Grounds. Abatement by statute.*

Where by statute certain actions are abated and power to maintain them is taken away, the trial court is without jurisdiction to further proceed and must dismiss such actions. *Johnson v. Reeves & Co.*, 227.

2. *State. Actions against. Involuntary dismissal.*

Where a bill does not state such a claim for which suit is authorized to be brought against the state in its sovereign capacity, the chancellor is authorized to dismiss such suit, as to the state. *Export Co. v. State*, 452.

DIVORCE.

1. *Alimony. Custody of children. Proceeding to modify decree. Payment of wife's counsel fees.*

The allowance of alimony is justified by the natural obligation of the husband as the bread winner of the family, to support his wife. If there is no legal marriage of the parties, there is no legal obligation on the husband for this support or for alimony. *Robinson v. Robinson*, 224.

2. *Custody of children. Proceedings to modify decree. Payment of wife's counsel fees.*

Where a husband and wife have been divorced and the wife allowed alimony in a gross sum, the husband is not liable for the wife's counsel fees in a subsequent proceeding to modify the final decree in the divorce proceeding so as to award the custody of the children to the wife, since the parties were then legally strangers to each other and there being no statutory authority for such an allowance. *Id.*

DRAINAGE—ELECTIONS.

DRAINAGE.

1. *Waters and water courses. Surface waters. Right to deflect. Prescription. Knowledge.*

The common-law rule which obtains in Mississippi, is that surface water is a common enemy which every proprietor may fight as he deems best, regardless of its effect upon other proprietors, and that accordingly the lower proprietor may take any measures necessary for the protection of his property, although the result is to throw the water back upon the land of an adjoining proprietor. *Holman v. Richardson*, 216.

2. *Same.*

Where surface water has been accustomed to gather and flow along a well-defined channel which by frequent running, it has worn into the soil, it may not be obstructed to the injury of the dominant proprietor and a lower proprietor must protect himself with due regard to the rights of the upper proprietor and so as not to injure him unnecessarily, and is liable for any injury due to his recklessness or negligence. *Id.*

DRAINS.

See NOTICE.

EJECTMENT.

Pleading. Variance. Statute.

The effect of section 1827, Code 1906, is to confine the plaintiff in ejectment to a recovery upon the title outlined in his bill of particulars and where plaintiffs in ejectment in their bill of particulars deraign title by inheritance from their father who it is claimed acquired title by adverse possession, they are confined to the title thus outlined, and cannot recover by showing a different title derived by inheritance from their mother. *Smith v. Whittington*, 759.

ELECTIONS.

1. *Counties. Bonds. Notice. Publication. Statutes. Title. Sufficiency of title. Appeal and error. Review. Questions to be decided.*

Chapter 174, Laws 1916, which is an amendment to chapter 176, Laws 1914, does not require any publication of the intention of the board of supervisors to issue road bonds, where the petition presented shows that the proposed bond issue is in excess of five hundred thousand dollars; when the bond issue is to be in excess of five hundred thousand dollars the board of supervisors is by the statute required to order an election to ascertain the will of the qualified electors of the county. *Rosenstock v. Board of Sup'rs.*, 124.

 EMBEZZLEMENT—EQUITY.

ELECTIONS—Continued.

2. *Counties. Creation. Procedure. Registration of voters.*

Under Acts 1916, chapter 527, section 15, providing, that the registration books of the county of Harrison shall be the registration books for the purpose of the election to be held in the territory embraced in the county of Stone and that the polling places now established in the county of Harrison and embraced in Stone county shall be the voting places for the purpose of holding the election under section 3 of the act. This act was sufficient authority for the purpose of holding the election and the fact that section 15 of the act provides that qualified electors shall be registered ten days before said election, and that the commissioners, if they see proper, may establish other voting precincts, and shall divide the territory into convenient voting precincts, which was not done, does not invalidate the election, as it was discretionary with the commissioners as to the establishing new precincts and to register a person ten days before the election would not qualify him to vote. *Hatten v. Bond*, 590.

3. *Counties. Creation. Procedure. Submission to popular vote.*

Under section 260 of the Constitution so providing, no new county can be formed unless a majority of the qualified electors voting in each part of the county or counties proposed to be dismembered and embraced in the new county shall separately vote therefor. *Id.*

EMBEZZLEMENT.

1. *Offense. Sufficiency of evidence. Statement of owner.*

In a prosecution of a hack-driver for embezzlement under an affidavit charging that he received a two dollar bill of a patron and returned change for only one dollar and refused on demand to pay the patron the sum of one dollar, the court held that the evidence as set out in the opinion was insufficient to convict. *Roan v. City of Hattiesburg*, 269.

2. *Same.*

In such case the fact that the patron afterwards told the defendant that he had given him the two dollar bill by mistake is immaterial, for the reason that defendant in so far as the criminal law is concerned, was under no duty to accept his unsupported statement and pay him the money claimed on the faith of it. *Id.*

EQUITY.

1. *Fraudulent conveyances. Bills to subject property. Action at law on debt. Parties to action. Joinder. Misjoinder. Necessary parties. Prior lien holders. Pleading. Allegations of fraud.* Although plaintiffs had commenced proceedings at law for the

EQUITY.

EQUITY—Continued.

recovery of the debt, which is the foundation of their bill in equity, this did not preclude them from prosecuting, at the same time, with the action at law, a bill in equity to subject property fraudulently conveyed by the defendants. *McCoy v. Machine Co.*, 7.

2. *Fraudulent conveyances. Misjoinder of party defendants.*

When a bill in equity neither states a cause of action against, nor seeks any relief from, one of the defendants, such defendant is improperly joined as a defendant, but such misjoinder should not result in the dismissal of the bill as to any other of the defendants. *Ib.*

3. *Fraudulent conveyance. Necessary parties defendant. Prior lien holders.*

Where a bill in equity sought to subject property fraudulently conveyed, it was not necessary that the holders of liens placed on the property involved prior to the execution of the alleged fraudulent conveyances, should be made parties defendant, where such liens were not attacked. *Ib.*

4. *Injunctions. Enjoining elections.*

Not only should equity refrain from interfering with the preliminary steps in the holding of an election on purely political matters, but should also refrain from interfering with the free exercise of the legislative functions of government whether attempted to be exercised by the legislators or by the people in their sovereign capacity. *Power v. Ratliff*, 88.

5. *Account. Discovery. Facts warranting relief.*

Where a bill charged business dealings between the parties for several years, that the accounts between them are mutual accounts and are complicated, and that the status of the accounts was within the knowledge of defendants, and praying for a discovery and accounting and decree accordingly and the bill further charges that all the defendants were indebted to complainant in a gross sum, a part of which was due and owing by two of the defendants and the other part by the other defendant and that on account of the relation of all parties to each other the indebtedness was a joint liability, and that complainant had no knowledge as to the amount due by each and that a discovery was necessary; such facts alleged in the bill of complainant were sufficient to warrant the lower court in granting the relief prayed for. *Realty Agency v. Mortgage & Bond Co.*, 181.

See PLEADING AND PRACTICE.

 ESTOPPEL—EVIDENCE.

ESTOPPEL.

1. *Failure to assert title. Bona-fide purchaser.*

If the vice president of a bank claiming to be the owner of a promissory note was present at the time of the payment of the note by the payer to the bank and knew and understood what was going on, then it was his duty, certainly as an officer of the bank to have explained the true situation to the payer and failing to do so, he would be estopped from maintaining a suit on the note against the payer. *Silvey v. Williamson*, 276.

2. *Municipal corporation. Streets. Encroachments. Estoppel of city.*

Where complainant's predecessor in title owned a triangular lot at the intersection of two streets and desiring to erect a building thereon employed a contractor to erect such building who obtained a permit from the clerk of the city but was told by him that before the building could be erected it would be necessary for the city engineer to establish the street lines at that point and accordingly the city engineer did establish such street lines, but erroneously placed the street line on one of the streets several feet over the true and correct line. In such case where the building was erected on the line given by the city engineer and extended several feet into the street, the city was estopped from injuring or damaging the building while it stood on the strip of ground in the street, but the public was not divested of title to such strip, and complainant's only right was to have its possession quieted and confirmed so long as the wall might stand on the strip. *City of Jackson v. Bank & Trust Co.*, 537.

3. *By pleading. Nature of title asserted.*

Where a complainant alleged in a bill not sworn to that he claimed land under a gift from his father, and claimed title exclusive of every one else except his co-plaintiffs, he was not estopped in another suit for the land to dispute that he was a tenant in common with his brother and sister, who were not co-plaintiffs in the first suit. *Pigott v. Pigott*, 873.

4. *Evidence. Pleadings. Unsworn pleadings as evidence.*

Admissions and declarations of facts contained in unsworn pleadings are not admissible as evidence against the party pleading, nor is he estopped by an expression of opinion therein as to his legal rights and liabilities. *Id.*

EVIDENCE.

1. *Judicial notice. Character and habits of domestic animals.*

The courts take judicial notice of the character and habits of domestic animals. *State v. Widman*, 1.

EVIDENCE.

EVIDENCE—Continued.

2. *Bail. Admission to bail.*

A party charged with homicide should be admitted to bail where the proof is not evident nor the presumption great and his health has been impaired by confinement in jail and because he has been denied a hearing on account of the term of court at which he should have been tried has been pretermitted through no fault of his. *Ex Parte Mormon*, 15.

3. *Intoxicating liquors. Possession with intent to sell. Sufficiency.*

Before a conviction can be had under section 1797, Code 1906, as amended by chapter 114 of Laws 1908, providing that, "it shall be unlawful for any person to have in his possession any intoxicating liquors with the intention or for the purpose of selling the same, or giving it away in violation of law," there must be evidence of a sale or intent to sell such liquors and the fact that defendant has a large quantity of liquor in his possession alone is not sufficient to convict. *Washington v. City of Jackson*, 171.

4. *Embezzlement. Offense. Sufficiency of evidence. Statement of owner.*

In a prosecution of a hack-driver for embezzlement under an affidavit charging that he received a two dollar bill of a patron and returned change for only one dollar and refused on demand to pay the patron the sum of one dollar, the court held that the evidence as set out in the opinion was insufficient to convict. *Roan v. City of Hattiesburg*, 269.

5. *Same.*

In such case the fact that the patron afterwards told the defendant that he had given him the two dollar bill by mistake is immaterial, for the reason that defendant in so far as the criminal law is concerned, was under no duty to accept his unsupported statement and pay him the money claimed on the faith of it. *Ib.*

*6. *Adverse possession. Sufficiency of evidence. Color of title. Possession and occupation. Actual possession. Burden of proof.*

On a bill to confirm title and to cancel defendant's claims, the court held that the evidence set out in the opinion of the court did not establish that defendant entered the land under color of title. *Dedeaux v. Lumber Co.*, 325.

7. *Adverse possession. Burden of proof.*

Where on a bill to confirm title and cancel defendant's claims, the defendant admitted the validity of plaintiff's paper title, but claimed title by adverse possession, the burden of establishing his title by adverse possession is on him. *Ib.*

EVIDENCE.

EVIDENCE—Continued.

8. *Criminal law. Judicial notice. Municipalities.*
Courts not only take judicial cognizance of municipalities but of the existence and general course of important railroads. *Hill v. State*, 375.
9. *Homicide. Admissibility of uncommunicated threats by decedent.*
It was prejudicial error on a trial for homicide, to exclude testimony of uncommunicated threats by decedent against accused where accused claimed to have acted in self defense, since such threats indicated the feeling of deceased toward accused. *Leverett v. State*, 394.
10. *Same.*
It was also prejudicial error to exclude testimony by the deceased towards accused where such threats had been communicated to accused before the killing. *Ib.*
11. *Same.*
Where there was evidence that decedent had made threats against accused at a certain place, it was prejudicial error to exclude corroborative evidence that deceased was in fact, at the time mentioned, at such place. *Ib.*
12. *Homicide. Admissibility of evidence. Self defense.*
Where accused claimed he killed deceased in self defense in a quarrel, over deceased's improper relations with defendant's wife, it was prejudicial error to exclude the wife's testimony that she had written a letter found by accused on the person of deceased, since such evidence had a tendency to prove the corroborative circumstances of the defense genuine. *Ib.*
13. *Homicide. Admissibility of evidence. Self defense. Circumstances preceding the act.*
Where on a trial for homicide accused claimed he killed decedent in self defense, it was prejudicial error to admit evidence that the night before the killing some one wearing clothes similar to accused's was seen watching the mill where deceased worked, where there was no further identification. *Ib.*
14. *Criminal law. Instructions. Weight of evidence.*
Where on a trial for homicide accused claimed he killed deceased in self defense in a quarrel over deceased's improper relations with accused's wife, an instruction to the jury for the state, to disregard the finding of a letter from accused's wife on decedent's body, was prejudicial error, because on the weight of evidence and because such evidence was important and material evidence as corroborative of defendant's claim of self defense. *Ib.*

EVIDENCE.

EVIDENCE—Continued.

15. *Presumption. Compliance with law.*

Where there is no evidence to the contrary, the presumption is that an interstate carrier has complied with the federal laws. *Telegraph Co. v. Showers*, 411.

16. *Writings. Writings beyond jurisdiction of court. Admissibility.*

Secondary evidence of the contents of a letter will not be admitted for the defendant upon a mere showing that the letter was in another state in defendant's desk at his office, without proof that it was lost, destroyed, or misplaced, or that it could not be found after diligent search. *Chemical Co. v. Jennings*, 513.

17. *Deeds. Drunkenness of Grantor.*

Under the facts set out in the opinion, the court held in this case that the evidence was not sufficient to show that complainant was drunk when he executed the deed to his interest as devisee under the will. *Caulk v. Burt*, 660.

18. *Pleading. Admission. Matter to be proved. Publication.*

Where a bill of complaint alleged the publication of an ordinance and this was not denied by the answer, no evidence of such publication was necessary. *Bryan v. City of Greenwood*, 718.

19. *Larceny. Sufficiency.*

Under the facts in this case the court held that the evidence was not sufficient to show beyond all reasonable doubt the guilt of the defendant of the larceny charged. *Bowman v. State*, 786.

20. *Replevin. Peremptory instruction.*

Where a trustee under a deed of trust to secure the purchase price of cattle brought an action of replevin for the cattle covered by the trust deed and there was a conflict in the evidence as to whether the debt secured by the trust deed had been paid, the court should not have given a peremptory instruction for the plaintiff. *Snowden v. Collins*, 801.

21. *Abortion. Criminal prosecution. Instruction.*

In a prosecution under Code 1906, section 1234, for attempting to commit an abortion, an instruction that, if the jury believe beyond a reasonable doubt from the evidence that accused willfully unlawfully, and feloniously inserted in the uterus or womb, of a woman a rubber catheter and gauze with the intention and purpose of causing an abortion or destroying an unborn quick child then in said womb, he is guilty as charged in the indictment, and the court further charges the jury that this is true even though you may believe from the evidence that the woman was an unmarried woman, and that said unborn child was an illegitimate one, was a proper instruction. *Smith v. State*, 802.

EXAMINATION OF JURORS—EXECUTION.

EVIDENCE—Continued.

22. *Witnesses. Criminal prosecution. Character of evidence. Cross examination.*

Where in a prosecution for attempting to commit an abortion the defendant introduced witness to prove his character as to the trait charged, it was not error to permit the witness on cross-examination to state that they had heard charges of this kind against defendant before, but that they knew personally nothing of these matters, since the defendant having put his character as to this charge in evidence, it was permissible for the state to cross examine the witness in this way. *Ib.*

23. *Larceny. Sufficiency.*

Under the facts as set out in the opinion the court held that a conviction for larceny of a steer could not be sustained. *Dillard v. State*, 826.

24. *Death. Presumption. Fine. Death. Statute.*

Under Code 1906, section 1914, creating the presumption of death after seven years unexplained absence the burden of proof is upon the party interested in proving the death at any particular time, since in such case the law raises no presumption as to the precise time of death. *Life Ins. Co. v. Brame*, 828.

25. *Pleadings. Unsworn pleadings as evidence.*

Admissions and declarations of facts contained in unsworn pleadings are not admissible as evidence against the party pleading, nor is he estopped by an expression of opinion therein as to his legal rights and liabilities. *Pigott v. Pigott*, 873.

See INSANITY; APPEAL AND ERROR; INSTRUCTIONS; JURY.

EXAMINATION OF JURORS.

See APPEAL AND ERROR.

EXECUTION.

1. *Injunction.*

An injunction should not be granted by the chancery court to prevent the issuing of an execution based upon a judgment at law unless the facts show the clearest and strongest reasons for the interposition of the courts of chancery. *Welch v. Hannie*, 79.

2. *Injunction. Default judgment. Pleading and proof.*

Before a court of chancery will take jurisdiction to enjoin an execution based upon a default judgment at law, the complainant must allege in his bill and prove, if the fact be denied, that he has a good and meritorious defense to the action at law. It is incumbent upon the complainant to set out in his bill, and also

EXECUTORS AND ADMINISTRATORS—DEVISE.

EXECUTION—Continued.

prove the fact showing such defense. It is not enough that he merely allege the conclusion of law of such defense. *Welch v. Hannie*, 79.

8. *Claim of third person. Sufficiency of evidence.*

Where plaintiff makes out a *prima facie* case it is error for the court to give a peremptory instruction for defendant. *Wood Fiber Co. v. Thornton*, 258.

EXECUTORS AND ADMINISTRATORS.

1. *Settlement of estate. Approval of claims by clerk. Statute.*

The requirement under Code 1906, section 2106, that the clerk if he approves, shall endorse on a claim against the estate of a decedent the words "probated and allowed for \$— and registered this — day of ——" is mandatory and in the absence of such endorsement the claim is lifeless, but the court if of the opinion that the clerk actually intended to approve and allow the claim, had the power within one year before the claim was barred by the statute of limitations under section 2106 of the Code of 1906, to enter an order, authorizing the clerk to approve and allow the claim under the statute, when however the one year statute of limitations has run, the court and the clerk are both absolutely powerless to breathe the breath of life into the claim. *Stevens v. Mercantile Co.*, 524.

2. *Same.*

The only competent evidence of the probate and allowance of a claim against the estate of a decedent, is the written indorsement of the clerk. *Id.*

3. *Probating claim. Affidavit. Statute.*

The affidavit required under Code 1906, section 2106, to probate an account against the estate of a decedent, where there is no written evidence of the debt, must be made by the creditor himself and not by an agent, in such case an affidavit by the agent amounts to no affidavit at all. *Persons v. Griffin*, 643.

4. *Probating claims. Authority of court.*

Courts have no right to assume the justice or correctness of any claim offered against the estate of a decedent, until the proposed claim has been duly probated in the manner provided by law. *Id.*

EXECUTORY DEVISE.

1. *Wills. Estates created. Remainders. Supervisor.*

Where a testator by will devised lands to four daughters, with the provision that if any of them died without issue or bodily heirs, her part should go to the surviving sisters or sister, declaring an intention that the daughters should share and share alike,

FEDERAL COURTS—FISH AND GAME.

EXECUTORY DEVISE—Continued.

in such case each of the four daughters took a fee, defeasible upon their deaths without issue, leaving one or more of the other devisees surviving them; the limitation over upon the death of each without issue to the survivor or survivors being a valid executory devise. *Armstrong v. Thomas*, 272.

2. Same.

In such case where three of the sisters had acquired the interest of the fourth, on the death of one of the three a one-third interest in her share of the estate shifted to and become vested in a surviving sister in fee absolute, there being nothing in the will to indicate that she should take it with the limitation over to which her original share was subject. *Ib.*

3. Wills. Estates created. Survivors.

Where a testator devised lands to his four daughters in fee, defeasible upon the death of any one without issue leaving one or more of the other daughters surviving her, so that the limitation over to the survivor or survivors was a valid executory devise, the deaths of two of the sisters leaving children surviving them terminated their contingent interest in the limitation over and the fee in the surviving sister became absolute and so children of prior deceased sisters took nothing; the word "survivor" meaning one who outlives others and must be given this meaning in devises of this character in the absence of words indicating that such was not the testator's intention. *Ib.*

FEDERAL COURTS.**Rules of decision. Federal court decisions.**

In the case of interstate shipments, the rule announced by the federal courts as to the reasonableness of a limitation by contract for the shipment of live stock, of the time within which a claim for loss must be made, will be followed by the state courts. *Railway Co. v. Davis & Co.*, 119.

FIDELITY INSURANCE.

See INSURANCE.

FISH AND GAME.**1. Statute. Validity. Construction under void statute.**

A majority of the supreme court are agreed that chapter 99, Laws 1916, should not be regarded in force and effect in Mississippi, and from this it necessarily follows that there is no such public office now as that of state game and fish commissioner. *State v. Brantley*, 812.

FOREIGN CORPORATION—FRAUDULENT CONVEYANCES.

FISH AND GAME—Continued.

2. *Same.*

Laws 1916, chapter 99, being void, no conviction thereunder can be sustained. *State v. Brantley*, 812.

FOREIGN CORPORATION.

See CORPORATIONS.

FORGERY.

Indictment. Sufficiency. Statute.

Under Code 1906, section 1187, providing that any one who with intent to defraud, forges or counterfeits any instrument in writing, purporting to be the act of another by which any pecuniary demand shall be or purport to be created, by which any person may be injured in his person or property, shall be guilty of a felony, an indictment charging that defendant falsely and feloniously forged and counterfeited a check as set out in the opinion of the court, was good against demurrer. *State v. Ellis*, 503.

FRAUD.

Release. Promise of re-employment. Injuries to servant.

Where a railroad engineer being injured, settled with the company for six thousand dollars, and executed a release one year after he received his injuries, which release he claimed was procured by the fraudulent misrepresentations of the company that it would employ him as engineer when he had fully recovered, such representations if made did not render the release void, but at most, only voidable and the engineer cannot disregard it and sue at law on his original cause of action without returning or offering to return the consideration paid him, it is only where the release is void that no tender is necessary. *Smith v. Railroad*, 878.

FRAUDULENT CONVEYANCES.

1. *Bills to subject property. Action at law on debt. Parties to action. Joinder. Misjoinder. Equity. Necessary parties. Prior lien holders. Pleading. Allegations of fraud.*

Although plaintiffs had commenced proceedings at law for the recovery of the debt, which is the foundation of their bill in equity, this did not preclude them from prosecuting, at the same time, with the action at law, a bill in equity to subject property fraudulently conveyed by the defendants. *McCoy v. Machine Co.*, 7.

FUTURES—GAMING.

FRAUDULENT CONVEYANCES—Continued.

2. *Misjoinder of party defendants. Equity.*

Where a bill in equity neither states a cause of action against, nor seeks any relief from, one of the defendants, such defendant is improperly joined as a defendant, but such misjoinder should not result in the dismissal of the bill as to any other of the defendants. *Ib.*

3. *Necessary parties defendant. Prior lien holders.*

Where a bill in equity sought to subject property fraudulently conveyed, it was not necessary that the holders of liens placed on the property involved prior to the execution of the alleged fraudulent conveyances, should be made parties defendant, where such liens were not attacked. *Ib.*

4. *Pleading. Allegations of fraud.*

Where a bill in equity charged that the deeds sought to be cancelled, other than the one to a named lumber company were executed without any consideration having been paid therefor by the grantees therein, for the purpose on the part of both the grantors and grantees of hindering, delaying and defrauding the complainant in the collection of its debt, which fact was known to such lumber company when it afterwards purchased the land from the alleged fraudulent grantees, the said lumber company thereby intending to aid in placing the lands still further beyond the reach of the debtor's creditors, such allegations of fraud were sufficient to call for an answer. *Ib.*

FUTURES.

See GAMING; CONTRACTS.

GAMING.

1. *Futures. Recovery of loss. Statutes. Agent or intermediary. Money lent or advanced. Cancellation of mortgage. Invalidity. Wages.*

Under Laws 1908, chapter 118, prohibiting dealings in futures and declaring such contracts unlawful and section 9 providing that the wife of a person sustaining a loss in future transactions, may within five years, recover, by suit, the amount so lost as liquidated damages from the broker, agent, or intermediary negotiating such transactions, a bank which did not represent any cotton broker with whom plaintiff's husband did business, did not receive the market quotations, and take orders for future contracts, had no private wire over which to receive quotations and to submit orders, in short was not the agent or intermediary through whom plaintiff's husband did a gambling business, was not liable to the wife for the losses of her husband in gambling transactions in futures. *Cohn v. Brinson*, 348.

GAMING.

GAMING—Continued.

2. *Money lent or advanced. Recovery. Statutes.*

Under Code 1906, section 2302, giving a right to the wife of any one losing and paying money at gaming or wagering, a right to recover it, without expressly giving the wife the right to recover from a bank money knowingly lent or advanced for the purpose of gambling and section 2303, declaring futures unlawful, and giving her the right to sue for and recover money lost and paid on futures from the principal or agent knowingly receiving the money on such illegal transactions, the wife of one dealing in cotton futures directly with brokers in another state, could not recover money lent or advanced by a bank which knew of the borrower's dealings and never repaid, except by renewals forming a part of the consideration of a note secured by a mortgage of her homestead and other property. *Cohn v. Brinson*, 348.

3. *Dealing in futures. Recovery. Statutes.*

Under Code 1906, section 2300, making absolutely void and unenforceable any contract for the reimbursing, or repayment of any money knowingly lent or advanced for the purpose of gambling, and section 2301, providing that any mortgage or conveyance of any real estate to satisfy or secure money loaned or advanced for such purpose shall vest in the wife and children of the mortgagor the whole title of the mortgagor as though he had died intestate, the wife of one to whom a defendant bank knowingly lent or advanced money for use in dealing in cotton futures, unpaid except by renewals forming a part of the consideration for a note secured by a mortgage executed by herself and husband including their homestead and her separate property, was entitled to have the mortgage cancelled whereupon the property would immediately vest in herself and children if any. *Id.*

4. *Same.*

In such case it was immaterial that the borrower had the right to buy cotton futures by mail or wire directly from brokers in another state, since it is the policy of the law to prohibit gambling of any kind and to deny the courts of the state to enforce gambling contracts no matter where made. *Id.*

5. *Futures. Invalidity. "Wager."*

It is settled law that the contract for the purchase and delivery of a commodity in the future and for the payment of the difference in price arising out of the rise and fall in the market above or below the contract price is a wager on the future price of the commodity, and is for that reason void when the real intent of the parties is simply to speculate on the rise and fall of prices and the goods are really not to be delivered. *Id.*

GARNISHMENT—HOMICIDE.

GARNISHMENT.

1. *Contested answer. Attorney's fee. Statute.*

Under section 2361, Code 1906, which provides that "A garnishee shall be allowed for his attendance, provided he shall put in his answer within the time prescribed by law, the pay and mileage of a juror, and in exceptional cases rendering it proper, the court may allow the garnishee reasonable compensation additional to the foregoing" etc., a garnishee will not be allowed attorney fees for defending his answer when contested and where he fails to put in his answer in time will be allowed no compensation whatever. *Shoe Co. v. County Bank*, 315.

2. *Attorney's fees. Statutes.*

Code 1906, section 2361, which permits the court in exceptional cases rendering it proper, to allow to the garnishee reasonable compensation in addition to *per diem* and mileage, does not permit the allowance to him of an attorney's fee for defending an issue made by a traverse of his answer and it is immaterial whether or not the answer was filed within the time allowed by law. *Jones Shoe Co. v. Bank*, 650.

HABEAS CORPUS.

Appeal. Scope of review.

On an appeal by a petitioner for *habeas corpus* from a judgment declining to discharge him from custody, where the initiative and referendum amendment can have no effect upon the law under which appellant was convicted, its validity *vel non* is of no concern to him and the supreme court is not called upon to express an opinion relative thereto. *Ex Parte Jones*, 27.

HIGHWAYS.

See ROADS AND HIGHWAYS.

HOMICIDE.

1. *Instruction on manslaughter.*

Where on a trial for murder the testimony of the defendant if believed was sufficient to justify a verdict of manslaughter, it was proper for the court on request of the state to give an instruction on manslaughter. *Watson v. State*, 16.

2. *Insanity. Evidence. Criminal law. Capacity. Passion.*

In a trial for homicide evidence for defendant to prove his insanity should be excluded where, at most, it only tends to prove that defendant was probably excentric, passionate and excitable and where such evidence would not cause any reasonable man to doubt his sanity. *Garner v. State*, 317.

HOMICIDE.

HOMICIDE—Continued.

3. *Same.*

Mere frenzy or ungovernable passion is not insanity within the meaning of the law, sufficient to excuse crime. *Garner v. State*, 317.

4. *Instructions. Manslaughter. Evidence.*

In a trial for homicide where the evidence was conflicting as to who was the aggressor in a fight during which one of the participants was killed by the other and the jury might have believed from the evidence that the killing was in the heat of passion, an instruction on manslaughter should have been given when asked for by the defendant and the failure in such case to give such instruction was reversible error. *Martin v. State*, 365.

5. *Admissibility of uncommunicated threats by decedent.*

It was prejudicial error on a trial for homicide, to exclude testimony of uncommunicated threats by decedent against accused where accused claimed to have acted in self defense, since such threats indicated the feeling of deceased toward accused. *Leverett v. State*, 394.

6. *Same.*

It was also prejudicial error to exclude testimony by the deceased towards accused where such threats had been communicated to accused before the killing. *Ib.*

7. *Same.*

Where there was evidence that decedent had made threats against accused at a certain place, it was prejudicial error to exclude corroborative evidence that deceased was in fact, at the time mentioned, at such place. *Ib.*

8. *Admissibility of evidence. Self defense.*

Where accused claimed he killed deceased in self defense in a quarrel, over deceased's improper relations with defendant's wife, it was prejudicial error to exclude the wife's testimony that she had written a letter found by accused on the person of deceased, since such evidence had a tendency to prove the corroborative circumstances of the defense genuine. *Ib.*

9. *Admissibility of evidence. Self defense. Circumstances preceding the act.*

Where on a trial for homicide accused claimed he killed decedent in self defense, it was prejudicial error to admit evidence that the night before the killing some one wearing clothes similar to accused's was seen watching the mill where deceased worked, where there was no further identification. *Ib.*

INDICTMENT AND INFORMATION.

HOMICIDE—Continued.**10. Instructions. Self defense.**

On a trial for homicide where defendant claimed to have acted in self defense, it was prejudicial error to refuse an instruction for the defendant, that the jury might consider a previous threat by decedent to kill accused the next time they met. *Id.*

11. Instructions. Self defense.

In a trial for homicide where accused defended on the ground of self defense, it was error for the court to refuse the defendant an instruction, that a man about to be assaulted with a deadly weapon is not required by the law to wait until his adversary is on equal terms with him, but may rightfully anticipate his action and kill him when to strike in anticipation reasonably appeared to be necessary to self defense. *Id.*

12. Murder. Question for jury.

Under the facts as set out in its opinion in this case the court held that the evidence was sufficient to go to the jury on the question as to whether or not defendant was guilty of murder. *Rees v. State*, 765.

INDICTMENT AND INFORMATION.

1. Sufficiency. Following language of statute. Railroads. Regulations. Posting of anti-tipping statute.

Under Laws 1916, chapter 136, section 3, providing that each dining car, railroad, or sleeping car company, doing business in this state, shall post two copies of the anti-tipping statute in conspicuous places in each passenger coach or sleeping car, while the language of the statute is broad enough to require the posting of the statute in all passenger coaches, not only while actually being used for the transportation of passengers, but also while not in use, but standing idle on the tracks, yet it is clear that its purpose is to make criminal only, the failure to post it in passenger coaches while actually being used for the transportation of passengers and an indictment under this statute which fails to allege this is insufficient. *State v. Southern Ry. Co.*, 23.

2. Same.

Where the language of the statute is so specific as to give notice of the act made unlawful, and so exclusive as to prevent its application to any other acts than those made unlawful, it is sufficient to charge the offense by using only the words of the statute, but where the act prohibited does not clearly appear from the language employed, or where, under certain circumstances, one may lawfully do the thing forbidden, by the literal mean-

 INDICTMENT AND INFORMATION.

INDICTMENT AND INFORMATION—Continued.

ing of the words of the statute, it is not sufficient to indict by the use only of the statutory words. *State v. Southern Ry. Co.*, 23.

3. *Same.*

Where the language of the statute is broader than its purpose, and the indictment is in the words of the statutes it cannot be told whether the jury intended to find defendant guilty of the act forbidden by the statute, or of those only, within its literal but not its true construction and in such case it is necessary for the pleader to depart from the statute and indict in words aptly charging, in all cases in which the words of the statute do not by legal intendment import a particular offense certainly committed by one who has violated its literal language. *Id.*

4. *Banks and banking. Receiving deposit for insolvent bank. Prosecution.*

This indictment for receiving deposits for an insolvent bank knowing or having good reason to believe it insolvent, as set out in the facts of this case, was held by the court sufficient under Code 1906, section 1169, as amended by Laws 1912, chapter 211, dealing with this offense. *State v. Bridgforth*, 221.

5. *Forgery. Sufficiency. Statute.*

Under Code 1906, section 1137, providing that any one who with intent to defraud, forges or counterfeits any instrument in writing, purporting to be the act of another by which any pecuniary demand shall be or purport to be created, by which any person may be injured in his person or property, shall be guilty of a felony, an indictment charging that defendant falsely and feloniously forged and counterfeited a check as set out in the opinion of the court, was good against demurrer. *State v. Ellis*, 503.

6. *Abortion. Attempts. Sufficiency.*

Under Code 1906, section 1235, making it manslaughter to administer or use medical or other means with intent thereby to destroy an unborn child and thereby destroy such child, unless the same shall have been advised by a physician to be necessary etc., and section 1049, providing that every person who shall attempt to commit an offense and shall do any overt act towards the commission thereof, but shall fail, etc., on conviction shall be punished etc. An indictment which charges that defendant did willfully, unlawfully, feloniously design and endeavor to kill, abort, and destroy one unborn quick child, then and there in the womb of a woman then and there pregnant, by willfully, unlawfully and feloniously administering to and inserting in the womb of the said woman certain foreign substances etc., with the felonious intent then and there the said unborn quick child, in the

INFANTS—INITIATIVE AND REFERENDUM.

INDICTMENT AND INFORMATION—Continued.

womb of said woman as aforesaid, willfully, unlawfully and feloniously to kill, abort and destroy, contrary to the form of the statute etc., sufficiently charges the crime of an attempt to commit an abortion. *Smith v. State*, 802.

7. *Negating exceptions. Necessity.*

The exception in section 1235, Code 1906, defining abortion "unless the same shall have been advised by a physician" etc., need not be negated as it is an affirmative defense, which if relied upon must be shown by the defendant or appear affirmatively in the evidence. *Id.*

8. *Negating exceptions. Sufficiency.*

An indictment for abortion which avers that it was unlawfully and feloniously done, negatives its lawfulness. *Id.*

INFANTS.

Vendor and purchaser. Innocent purchaser. Equity of infant.

An infant having an equity in land has no better standing than an adult, as against an innocent purchaser of the land from one having the legal title. *Barksdale v. Learnard*, 861.

INITIATIVE AND REFERENDUM.

1. *Constitutional law. Amendment retroactive application. Habeas corpus. Appeal. Scope of review.*

Under well-established rules of construction, the initiative and referendum amendment inserted in the Constitution by resolution adopted by the legislature March 29, 1916 (Laws 1916, chapter 159), should not be held to apply to statutes passed prior to its insertion in the Constitution, unless the words thereof admit of no other meaning and since section 3 of the amendment is incapable of having any except a prospective operation, being manifestly designed to apply to statutes thereafter enacted, chapter 103, Laws 1916, being passed prior to the insertion of such amendment is not affected thereby but continued in force from the date of its passage and will so continue until repealed by the legislature. *Ex parte Jones*, 27.

2. *Habeas corpus. Appeal. Scope of review.*

On an appeal by a petitioner for *habeas corpus* from a judgment declining to discharge him from custody, where the initiative and referendum amendment can have no effect upon the law under which appellant was convicted, its validity *vel non* is of no concern to him and the supreme court is not called upon to express an opinion relative thereto. *Id.*

See ACTIONS, RIGHT AND CAUSE.

INJUNCTIONS.

INJUNCTIONS.

1. *Notice of writ. Necessity.*

Where plaintiff demurred to defendant's plea in abatement that plaintiff was barred by injunction in another state from suing him, by such demurrer plaintiff admits the existence of the injunction and it was his duty to obey it, irrespective of official notice thereof. *Fisher v. Ins. Co.*, 30.

2. *Same.*

If plaintiff did not know of the existence of the injunction until he filed his demurrer to such plea in abatement he will be presumed to have had knowledge of same at least from the time he filed his demurrer. *Ib.*

3. *Same.*

For an injunction to be binding it is not necessary that the defendant be served with the writ or otherwise officially notified of its existence. It is sufficient if he has received actual notice that an injunction has been issued against him. *Ib.*

4. *Against suits in another state.*

A citizen of one state may be enjoined from prosecuting an action against another citizen of the same state in a foreign jurisdiction for the purpose of evading the law of his own state and this rule applies, although the suit enjoined has been commenced in another state before the injunction issues. *Ib.*

5. *Same.*

The rule, to the effect that a citizen of one state may be enjoined from prosecuting an action against another citizen of the same state applies equally when an injunction is sought to restrain a citizen of one state from prosecuting an action against a non-resident corporation doing business with lawful authority in such state. *Ib.*

6. *Courts. Comity. Suits in another state.*

Upon principles of comity, so long as an injunction issued by a court of another state against a citizen thereof, forbidding him to sue in other states remains in force, he will not be permitted to sue in the courts of this state. *Ib.*

7. *Judgment. Collateral attack.*

Where there is set up as a defense to an action, an injunction by a court of plaintiff's residence restraining him from suing defendant elsewhere than in that state, the correctness of such injunction decree cannot be questioned in such action. *Ib.*

8. *Execution. Injunction.*

An injunction should not be granted by the chancery court to prevent the issuing of an execution based upon a judgment at

INJUNCTIONS.

INJUNCTIONS—Continued.

law unless the facts show the clearest and strongest reasons for the interposition of the courts of chancery. *Welch v. Hanne*, 79.

9. *Right to injunction. Persons entitled. Irreparable injury. Enjoining elections.*

The general rule is that an injunction will not lie to restrain the holding of an election, but there may be elections authorizing bond issues or directly affecting property rights, and if such an election is attempted to be held without authority of law, equity might well interfere. *Power v. Ratliff*, 88.

10. *Right to injunction. Persons entitled.*

Where tax payers objected to the submission of a legislative act to referendum vote on the ground that the constitutional amendment appearing in Laws 1914, chapter 520, providing for initiative and referendum was invalid, they do not suffer an irreparable injury entitling them to an injunction where the question is to be shortly submitted at a general election and the expense will be slight. *Ib.*

11. *Right to injunction. Irreparable injury.*

A game warden appointed under Laws 1916, chapter 99, cannot secure an order enjoining submission of the act to a referendum vote on the theory that he is entitled to the emoluments of his office and that a referendum of the act to the voters would work irreparable injury and on the theory that the constitutional amendment found in Laws 1914, chapter 520, providing for initiative and referendum was void for the law might be upheld by the voters, and if repealed the warden could then call in question the right of the people to nullify the act. *Ib.*

12. *Enjoining elections.*

Though the constitutional amendment found in Laws 1916, chapter 520, providing for initiative and referendum be void, a referendum election cannot be enjoined on the theory that if legislation be repealed, the repeal will be invalid, but the proper procedure is to take appropriate action to prevent the execution of any proposition voted upon, since the question of the validity of legislation is not one for the courts until the legislation is completed and until then the courts cannot determine whether the proper forms have been pursued. *Ib.*

13. *Same.*

Not only should equity refrain from interfering with the preliminary steps in the holding of an election on purely political matters, but should also refrain from interfering with the free exercise of the legislative functions of government attempted

 INSANITY—INSTRUCTIONS.

INJUNCTIONS—Continued.

to be exercised by the legislators or by the people in their sovereign capacity. *Power v. Ratliff*, 88.

See PLEADING AND PRACTICE.

INSANITY.

1. *Homicide. Evidence. Criminal law. Capacity. Passion.*

In a trial for homicide evidence for defendant to prove his insanity should be excluded where, at most, it only tends to prove that defendant was probably eccentric, passionate and excitable and where such evidence would not cause any reasonable man to doubt his sanity. *Garner v. State*, 317.

2. *Same.*

Mere frenzy or ungovernable passion is not insanity within the meaning of the law, sufficient to excuse crime. *Ib.*

INSTRUCTIONS.

1. *Homicide. Manslaughter.*

Where on a trial for murder the testimony of the defendant if believed was sufficient to justify a verdict of manslaughter, it was proper for the court on request of the state to give an instruction on manslaughter. *Watson v. State*, 16.

2. *Negligence. Question for jury. Peremptory.*

In an action for personal injury alleged to have been caused by the negligence of the defendant where the fact as to whether or not defendant was guilty of negligence was disputed, the case should have gone to the jury. *Gilchrist-Fordney Co. v. Price*, 20.

3. *Trial. Assuming facts. Carriers. Passengers. Action. Carrying beyond destination. Punitive damages.*

This instruction was also erroneous in placing upon the defendant the absolute duty to back its car for half a block when a passenger is carried beyond his destination. *Light & Traction Co. v. Taylor*, 60.

4. *Criminal law. Reasonable doubt.*

An instruction for the state that "by a reasonable doubt is meant not a mere speculative doubt or vague conjecture, mere supposition, or hypothesis, but such a doubt as reasonably arises out of the testimony, a doubt for which a reason can be given," besides being generally objectionable in attempting to define a reasonable doubt, is erroneous in declaring that a reasonable doubt must arise out of the evidence when it may arise also from the want of evidence. *Kelly v. State*, 245.

INSTRUCTIONS.

INSTRUCTIONS—Continued.

5. *Execution. Claim of third person. Sufficiency of evidence.*

Where plaintiff makes out a *prima facie* case it is error for the court to give a peremptory instruction for defendant. *Wood Fiber Co. v. Thornton*, 258.

6. *Bills and notes. Negotiability. Note payable to bearer. Bona-fide purchaser. Presumption. Defenses. Payment to person not in possession. Estoppel. Failure to assert title. Pleading. Necessity.*

Where there was no evidence as to when or how a vice president of a bank secured possession of a note payable to the bank or bearer in a suit by him upon the note, it was error to give a peremptory instruction for the defendant on proof of payment to the bank. *Silvey v. Williamson*, 276.

7. *Self defense. Ignoring defendant's version.*

Where on a trial for homicide, defendant testified that he shot deceased in self defense, but did not know the position of deceased when he fired the last three times because of the smoke. In such case an instruction to find the defendant guilty if he fired after deceased turned his back, and while defendant was in no real or apparent danger at his hands, was prejudicial error as ignoring defendant's version of the shooting and of what occurred at the time. *Leverett v. State*, 394.

8. *Trial. Collateral note. Action to recover interest.*

Where plaintiff brought suit against a bank to recover his alleged interest in a note which had been deposited as collateral with the bank and collected by it, where the evidence strongly tended to show a partnership between plaintiff and the party pledging the note, an instruction was erroneous, which authorized a verdict for the plaintiff if he had an interest in the note and had not agreed that it might be pledged as collateral, since such an instruction was prejudicial to defendant as ignoring the evidence as to a partnership. *Bank of Tupelo v. Hulsey*, 632.

9. *Trial. Peremptory instruction. Consideration by the jury.*

While it is not necessary for the jury to actually retire to consider a peremptory instruction, still before the law is actually given in charge to the jury the whole law of the case is within the breast of the trial judge and under his control. *Edwards v. Railroad*, 791.

10. *Trial. Degree of proof.*

In a suit for damages to plaintiff's pasture by fire started on a railroad right of way, where the defense was that the fire originated elsewhere, an instruction that if the jury was in doubt

 INSURANCE.

INSTRUCTIONS—Continued.

as to the origin of the fire, and could not say of a certainty which fire was the cause of the damages, they should find for the defendant, is erroneous, because it imposes on the plaintiff a greater burden of proof than the law requires. *Stevenson v. Railroad*, 899.

See APPEAL AND ERROR; EVIDENCE; SELF-DEFENSE; DEFENSE.

INSURANCE.

1. *Validity of contract. Use of property. Household goods. Valuation. Statute. Items.*

Where a furniture dealer sold and delivered household furniture with a reservation of title to a woman who kept a house of ill fame and thereupon took out a policy of fire insurance to protect his interest in the same, and afterwards took back the furniture under his reserved title and turned it over to another party who left the property in the house in which it was insured under the care of a watchman, and the furniture was burned. In such case the contract of insurance was not vitiated by the fact that the purchaser of the furniture kept a house of ill fame, since the premium paid by the insurer as a consideration of the contract was not connected with such use of the furniture. *Insurance Co. v. Heidelberg*, 46.

2. *Household goods. Valuation. Statute.*

Where the contract of insurance expressly insured the property as household furniture, and the various articles had been severed from the stock of the insured and delivered to the purchaser, put in order and were actually being used as household furniture they must be so classed. In such case the valued policy law applied and the insurer having the right of inspection when the insurance was written, could not show, that the actual cash value of the property was worth less than the amount of the insurance. *Ib.*

3. *Household goods. Valuation. Items.*

Under such contract where certain articles of furniture were sold by the insured after the taking out of the policy, directly to the purchaser to whom he had sold the rest of the furniture, after retaking it under his reserved title, and as to which no indorsement was made on the policy, so as to expressly include them, such last articles of furniture were not covered by the policy. *Ib.*

4. *Mutual benefit insurance. Reformation of policy to conform to application. Right of beneficiary.*

Where a member of a mutual benefit association made out and forwarded an application for life insurance which without his fault

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INSURANCE—Continued.

was lost and never received by the officers of the Supreme Lodge, and another application was executed and forwarded for him, which recited that it was only an application for a policy, which if granted, would become effective in thirty days after issuance; and a policy was duly issued and delivered which provided that if the member's certificate had not been in force thirty days, no benefit would be allowed in case of illness or death; and the member died less than thirty days from the date of issuance of the policy, in such case his widow, the beneficiary, could not have reformation of the policy so as to change its date to conform to the first application and thus render the benefit association liable. *Mutual Aid Ass'n v. Banks*, 458.

5. *Mutual benefit insurance. Liability. Appeal and error. Record. Presumption.*

Under a mutual benefit insurance policy, providing for the payment of a sum equal to the total assessments of members who shall meet their assessments and not to exceed one thousand dollars, the liability is *prima-facie* one thousand dollars and in case of a suit on such policy the burden of proof would then rest upon the association, in the event it desired to reduce the amount claimed by the insured under the policy, to allege and prove that the sum collected from its members by the assessment was less than one thousand dollars, since such fact is peculiarly, within the knowledge of the officers of the benefit association. *Woodman Benefit Assn. v. Ivy*, 494.

6. *Mutual benefit insurance. Liability.*

In a suit on such a policy the declaration for recovery thereon need not allege failure or refusal to make the assessment, or that if the assessment were made the full amount would have been collected. *Ib.*

7. *Accident insurance. Construction. "Work of any kind."*

Under an accident policy providing for weekly payments so long as insured was unable to do "work of any kind," the liability of the company only continues until plaintiff is able to do some work, either light or heavy for which he was fitted by nature, experience or training and the burden is upon him to show that he was unable to do any work at all of which he was capable. *Insurance Co. v. Jones*, 506.

8. *Casualty insurance. Construction of policy. Defenses of suit. "Immediate notice."*

Under an employer's liability insurance policy, which provided that the insurer would at its own expense investigate all accidents and defend all suits of which notices were given to it and that

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INSURANCE—Continued.

immediate notice of any accident and of any suit resulting therefrom should be forwarded to it, where insured failed to give "immediate notice" of the accident, which means notice within a reasonable time under all the facts and circumstances but did give immediate notice of an intended suit against it about sixty days after the accident, which enabled the insurer to investigate the claim, in such case it was the insurer's duty to defend the suit at its own expense and when it failed to do so, it was the duty of the insured to defend the suit at the expense of the insurer. *Fire Ins. Co. v. Hand-Jordon Co.*, 565.

9. *Casualty insurance. Action by insured. Reinsurance.*

Where an insurance company contracted with another insurance company whereby it reinsured such other company, which had issued an employers' liability policy to plaintiff for all of its outstanding liabilities, and agreed that any liability or expense under the former company's policies would be assumed and paid, such a contract was more than a contract of reinsurance and was made for the benefit of the insured and the insurance company which did not issue the policy directly to the insured, was also liable to him. *Id.*

10. *Casualty insurance. Defense of suit. Liability.*

Under an employer's liability insurance policy requiring the insurer to defend any suit of which notice should be given, excepting liability for any expense incurred by insured not specifically authorized by the insurer in writing, where the insurer declined to defend a suit after notice, it was liable for the expenses incurred by the insured in his successful defense of such suit. *Id.*

11. *Fidelity insurance. Bond. Construction.*

A provision in an employee's fidelity bond, that the bond should be invalid, unless signed by the employee, is a valid provision and binding unless the surety company has waived this provision or committed some act whereby it is estopped to claim immunity from liability under this condition of the bond. *Surety Co. v. Rieves*, 747.

12. *Fidelity. Bond. Signatures by principal. Waiver.*

A written application by an employee for an employee's fidelity bond, which expressly stipulated that he would reimburse the bonding company for any loss sustained by it on account of the bond, did not constitute a waiver on the part of the company of the provision in the bond, that it would be invalid unless signed by the employee since the bonding company was not compelled to make the bond at all and it had the right to set forth

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INSURANCE—Continued.

in the bond the terms upon which it would be liable for the honesty of the employee. *Ib.*

13. *Employee's fidelity. Bond. Signature by principal. Waiver.*

Where a bonding company did not know that the principal had failed to sign an employees fidelity bond issued by it, until after it was notified of the default, of the principal, when it at once notified the employed that it denied liability because of the failure of the principal to sign, although one renewal payment had been made to the company previous to this time, such facts did not constitute a waiver nor estop the bond company from setting up the defense that the principal did not sign the bond. *Ib.*

14. *Same.*

Where a bonding company did not learn that the principal had failed to sign the bond until after a default and no further premiums were paid, it was sufficient to tender the collected premium for the first time in court. *Ib.*

15. *Employee's fidelity. Insurance. Agents. Notice.*

Even though the principal in an employee's fidelity bond was a special agent to solicit business for the bonding company, yet in his application for his own bond as well as in his delivery of the bond to his employer he was not acting as the agent of the bonding company or of his employer, but for himself as the principal obligor in the bond and neither the bonding company nor his employer were chargeable with his acts or conduct in the delivery of the bond. *Ib.*

16. *Same.*

It was the duty of his employer to examine the bond and familiarize himself with its conditions and see that it was properly executed in conformity with its conditions, and the employer was charged with a knowledge of the contents of the bond, from the time of its delivery to it. *Ib.*

17. *Pleading. Surplusage. Action on life insurance policy.*

Where in a suit upon a life insurance policy the declaration alleged insured's seven years absence, which was on demurrer amended so as to charge also that insured was actually dead. Such a declaration was not defective as an attempt to recover in one court for both a common law cause of action and also a cause of action under section 1914, Code 1906, as to presumption of death, because the legal effect of the amended declaration was simply that the insured was dead and the allegation in regard to the seven years absence of insured was surplusage. *Life Ins. Co. v. Brame*, 828.

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INSURANCE—Continued.

18. *Action on life insurance policy. Limitations.*

Where one insured under a policy providing for the payment to the beneficiary "upon receipt and approval of proofs of death," disappeared, and the insurance company, being notified, declined to send blanks for proofs of death, taking the position that insured was alive, and sent a detective to investigate and after the expiration of seven years the insurance company did furnish such blanks, but declined to pay the claim. In such case in an action on the policy although the jury found that death occurred the day of disappearance, yet the cause of action was not barred by the six year statute of limitations, under Code 1906, section 3097, since the wording of the policy of insurance gave to the beneficiary a reasonable time within which to make out proofs of death, and in such case a reasonable time, and in fact the only time, in which the beneficiary could make out such proofs was at the expiration of the seven years, when the beneficiary under Code 1906, section 1914, could take advantage of the presumption of death then arising. *Life Ins. Co. v. Brame*, 828.

19. *Action. Interest.*

Where, an account of insured's unexplained disappearance, suit upon his life insurance policy, was not brought until after the expiration of seven years from such disappearance, and his policy provided for payment on "receipt and approval of proofs of death" of insured, and the jury found the death occurred on the day of disappearance, it was error to allow plaintiff the beneficiary to recover interest from the day of disappearance on the amount of the policy and premiums paid by insured before such disappearance, there being no receipt and no approval, and no proper rejection of proofs of death, until the filing of the suit, interest on such policy was only recoverable from the time when suit was brought. *Ib.*

20. *Recovery on policy. Interest.*

In a suit on a life policy, providing for payment "on receipt of satisfactory proofs of death of the assured," where assured disappeared and proofs were not made until seven years thereafter, and shortly before the bringing of the suit on the policy, the insurer was not liable for interest on the amount of the policy before the commencement of the suit, although it was shown that assured died on the date of his disappearance. *Life Assur. Soc. v. Brame*, 859.

21. *Payment of premiums. Recovery. Interest.*

Where insured in a life insurance policy disappeared and his beneficiary continued to pay premiums on such policy until the

INTERSTATE COMMERCE—JUDGMENT.

INSURANCE—Continued.

expiration of seven years from his disappearance, she could recover premiums so paid and interest thereon from the dates of payment respectively, if it was found that he died on the date of his disappearance. *Ib.*

INTERSTATE COMMERCE.

See COMMERCE.

INTERSTATE COMMERCE COMMISSION.

See COMMERCE.

INTOXICATING LIQUORS.

Possession with intent to sell. Evidence. Sufficiency.

Before a conviction can be had under section 1797, Code 1906, as amended by chapter 114 of Laws 1908, providing that, "it shall be unlawful for any person to have in his possession any intoxicating liquors with the intention or for the purpose of selling the same, or giving it away in violation of law," there must be evidence of a sale or intent to sell such liquors and the fact that defendant has a large quantity of liquor in his possession alone is not sufficient to convict. *Washington v. City of Jackson*, 171.

JUDGMENT.

1. *Collateral attack. Injunction.*

Where there is set up as a defense to an action, an injunction by a court of plaintiff's residence restraining him from suing defendant elsewhere than in that state, the correctness of such injunction decree cannot be questioned in such action. *Fisher v. Ins. Co.*, 30.

2. *Res adjudicata. Parties bound. Successor of state land commissioner.*

Where the state land commissioner was perpetually enjoined by a court of competent jurisdiction of the subject-matter and of the person, from conveying to any person other than complainant the swamp land title of the state to certain land, such decree bound his successor and those claiming under such successor and prevented such successor from making the conveyance so enjoined although the decree itself was erroneous and although it was not *res adjudicata* of the rights of the state. *Finch v. Dobbs*, 73.

3. *Justice of the peace. Default. *Validity.*

When in an action before a justice of the peace, it was agreed that the case could not be tried until Wednesday afternoon this

JUDGMENT LIEN—JURISDICTION.

JUDGMENT—Continued.

did not amount to an agreement to try the case in vacation, and the court being in session on Wednesday afternoon, the justice had full and complete jurisdiction to dispose of it at that time or not, and it being the duty of defendant to have informed himself that the term was still in session and to have ascertained what would be done with his case, a default judgment rendered on Thursday morning when the case was reached in due course was not void. *Welch v. Hannie*, 79.

4. *Justice of the peace. Validity.*

In a suit before a justice of the peace for unliquidated damages, the irregular introduction of plaintiff's testimony by statement of his counsel that the testimony was the same as in a previous trial and the justice being judge both of law and the facts, the failure to introduce testimony as to the amount of damages, were defects which rendered a default judgment irregular and voidable, but not void, and the irregularity can only be taken advantage of by appeal or writ of *certiorari*. *Id.*

5. *Nunc pro tunc. Power to enter. Conflicting with former judgment.*

When the court under Code 1906, section 802, so providing, after announcing his intention to give a peremptory instruction for the defendant, allowed plaintiff to take a voluntary nonsuit, and such judgment was duly entered, the court could not at a subsequent term render a judgment *nunc pro tunc*, in direct conflict with the one first entered, when no clerical error was shown. *Edwards v. Railroad*, 791.

6. *Same.*

Under Code 1906, section 802, so providing it was proper for the court to allow the plaintiff to take a voluntary nonsuit, where done before the jury retired, even though the court had previously announced its intention to grant a peremptory instruction for the defendant. *Id.*

JUDGMENT LIEN.

See LIEN.

JUDICIAL NOTICE.

See EVIDENCE.

JURISDICTION.

1. *Injunction against suits in another state.*

JURISDICTION.

JURISDICTION—Continued.

applies, although the suit enjoined has been commenced in another state before the injunction issues. *Fisher v. Ins. Co.*, 30.

2. Same.

The rule, to the effect that a citizen of one state may be enjoined from prosecuting an action against another citizen of the same state applies equally when an injunction is sought to restrain a citizen of one state from prosecuting an action against a non-resident corporation doing business with lawful authority in such state. *Ib.*

3. Courts. Comity. Injunction. Suits in another state.

Upon principles of comity, so long as an injunction issued by a court of another state against a citizen thereof, forbidding him to sue in other states remains in force, he will not be permitted to sue in the courts of this state. *Ib.*

4. Justice of the peace. Default judgment. Validity.

A judgment by default in an action before a justice was not rendered void because while it was pending he suspended business in his court room to sit as one of the committing justices for an alleged crime occurring in his district, though by agreement the committing trial was had in another district. *Welch v. Hannte*, 79.

5. Constitutional law. Drains. Assessments. Notice. Due process of law. Confirmation. Venue. Power of drainage commissioners.

Under said act the chancellor had jurisdiction to hear the cause in any county of his chancery court district, inasmuch as the act provides that he may hear the cause in vacation, and does not provide expressly that such petition shall be heard in the county where the land is located. *Simmons v. Drainage Dist.*, 200.

6. Dismissal and nonsuit. Grounds. Abatement by statute.

Where by statute certain actions are abated and power to maintain them is taken away, the trial court is without jurisdiction to further proceed and must dismiss such actions. *Johnson v. Reeves & Co.*, 228.

7. Carriers. Personal injury. What law governs. Obstruction appearing on road. Negligence. Question for jury.

Where plaintiff was injured in Tennessee by being struck by defendant's train while she was trying to flag the train, her right to recovery is based upon the precautionary statutes of that state. *Turner v. Railway Co.*, 359.

JURORS.

JURISDICTION—Continued.

8. *Evidence. Writings. Writings beyond jurisdiction of court. Admissibility.*

Secondary evidence of the contents of a letter will not be admitted for the defendant upon a mere showing that the letter was in another state in defendant's desk at his office, without proof that it was lost, destroyed, or misplaced, or that it could not be found after diligent search. *Chemical Co. v. Jennings*, 513.

9. *Descent and distribution. Law governing. Personalty. Statute.*

Under Rev. Code 1871, section 1950 (Code 1906, section 1648), declaring that personal property within the state shall descend and be distributed according to the laws of this state notwithstanding the domicile of the deceased may have been in another state, the descent of a leasehold interest in school land situated in this state is controlled by the laws of this state notwithstanding the domicile of deceased may have been in another state and under Code 1906, section 5081, which avoids the lapse of legacies on the death of the legatee during the lifetime of the testator only when the legatee left a child surviving, a legacy of such leasehold interest will lapse on the death of the legatee without children, though it would not lapse under the statute of the state where the testatrix was domiciled. *Neblett v. Neblett*, 550.

10. *Limitation of actions. What law governs.*

The statute of limitations of this state controls where suit is brought in this state upon a promissory note made in Ontario Canada. *Philp v. Hicks*, 581.

11. *States. Actions. Liabilities to suit.*

Under section 4800, Code 1806, requiring suits against the state to be brought in the court having jurisdiction of the subject matter which holds its session at the seat of government, an action against the state to recover the purchase price of a void tax title was improperly brought in Wilkerson county. *Land Commissioners v. Ford*, 678.

12. *Wills. Validity. What law governs.*

The validity of a will of a citizen of Mississippi who devises lands to charitable institutions is governed as to lands in Tennessee, by the laws of that state which do not prohibit such devises of land or money raised by the sale thereof, to charitable insti-

JURY—JUSTICE OF THE PEACE.

JURY.

1. *Costs. Jury tax. Statutes.*

A jury tax of three dollars is a part of the cost of a case under Code 1906, section 700, so providing. *Railroad Co. v. Mitchell*, 560.

2. *Homicide. Murder. Question for jury.*

Under the facts as set out in its opinion in this case the court held that the evidence was sufficient to go to the jury on the question as to whether or not defendant was guilty of murder. *Rees v. State*, 765.

JUSTICE OF THE PEACE.

1. *Review. Presumptions. Costs. Security. Waiver. Jurisdiction. Default. Judgment. Validity. Damages. Writ of inquiry. Execution. Injunction. Appeal.*

In a suit before a justice of the peace where the defendant made a motion for security for cost and plaintiff's attorney stated that he would be responsible for the cost and no further action was taken upon the motion, and judgment was entered for plaintiff, on appeal to the supreme court from a decree enjoining execution on the judgment, that court will presume that the statement of counsel was accepted by defendant. *Welch v. Hannie*, 79.

2. *Same.*

In such case it was the duty of defendant if he so desired, to have the court to pass upon his motion for security for cost and his failure to do so was a waiver of his rights. *Ib.*

3. *Jurisdiction. Default judgment. Validity.*

A judgment by default in an action before a justice was not rendered void because while it was pending he suspended business in his court room to sit as one of the committing justices for an alleged crime occurring in his district, though by agreement the committing trial was had in another district. *Ib.*

4. *Judgment. Default. Validity.*

When in an action before a justice of the peace, it was agreed that the case could not be tried until Wednesday afternoon this did not amount to an agreement to try the case in vacation, and the court being in session on Wednesday afternoon, the justice had full and complete jurisdiction to dispose of it at that time or not, and it being the duty of defendant to have informed himself that the term was still in session and to have ascertained what would be done with his case, a default judgment rendered on Thursday morning when the case was reached in due course was not void. *Ib.*

 LAND AND LAND TITLES.

JUSTICE OF THE PEACE—Continued.

5. *Judgment. Validity.*

In a suit before a justice of the peace for unliquidated damages, the irregular introduction of plaintiff's testimony by statement of his counsel that the testimony was the same as in a previous trial and the justice being judge both of law and the facts, the failure to introduce testimony as to the amount of damages, were defects which rendered a default judgment irregular and voidable, but not void, and the irregularity can only be taken advantage of by appeal of writ of *certiorari*. *Welch v. Hawte*, 79.

6. *Appeal. Time of taking.*

Since in our state there is no such thing as a justice of the peace having the right to grant a new trial, the defendant against whom judgment by default is rendered should perfect his appeal within the time allowed by law after the rendition of the judgment. *Ib.*

LAND AND LAND TITLES.

1. *Adverse possession. Possession and occupation.*

Where a party has no color of title to land, he can only acquire title by adverse possession to such part of the land as he has actually held in possession and inclosed, or otherwise actually and continually occupied, for the statutory period of ten years. *Dedeaux v. Lumber Co.*, 325.

2. *Same.*

Where a party occasionally went upon the land, and cut timber thereon and at other intervals burnt some coal kilns on the land but this occupation of the land was not continuous and hostile, nor for a period of ten years, such occupancy falls short of conferring title by adverse possession. *Ib.*

3. *Conveyances. Property conveyed. Actions.*

A deed conveying one hundred and seventy-five acres of land more or less, by metes and bounds, does not include three hundred other acres which by accretion had attached to the original tract before the conveyance. *Houston Bros. v. Grant*, 465.

4. *Deeds. Description. Sufficiency.*

Where the description in a land deed was "The land described as the north end of fractional southwest quarter of southwest quarter of section 33, township 18, range 15, containing four acres with the house on it, it sufficiently describes the land. *Harris v. Byers*, 651.

5. *Deeds. Warranty. Deed of trust.*

Where a grantor conveys land by warranty deed which at the time was covered by a deed of trust, he cannot acquire title from

LANDLORD AND TENANT.

LAND AND LAND TITLES—Continued.

a sale under such trust deed and set it up against his grantor but the title so acquired inures to his grantee under his warranty deed. *Ib.*

6. *Deeds. Property conveyed. Description.*

Where a deed conveyed land described as the north end of the southwest quarter of the southwest quarter of a named section, township and range, containing four acres if the grantor did not own the entire north end of the southwest quarter of the southwest quarter, his conveyance of four acres off the north end of said subdivision would operate to carry four acres of land off the north end of whatever land he owned in said subdivision. *Ib.*

7. *Courts. Rules of decision. Law of property.*

Where the courts of this state have decided that a land patent was void, because the requirement of the precedent execution of a bond by the statute had not been complied with, such decision established a rule of property, which, will govern subsequent cases involving the validity of such title. *Becker v. Bank*, 819.

8. *Tenancy in common. Acquisition of superior title.*

Where one cotenant purchases an outstanding superior title to the common property, he acquires thereby the legal title to the whole of it, but holds such title in trust for the benefit of those of his cotenants who may wish to avail themselves of it by contributing or offering to contribute their proportion of the purchase money, which right, as between him and his cotenant, will not be barred by mere lapse of time, but only when the delay to assert it, is accompanied by circumstances which give rise to an estoppel. *Barksdale v. Learnard*, 861.

9. *Estoppel. By pleading. Nature of title asserted.*

Where a complainant alleged in a bill not sworn to that he claimed land under a gift from his father, and claimed title exclusive of every one else except his co-plaintiffs, he was not estopped in another suit for the land to dispute that he was a tenant in common with his brother and sister, who were not co-plaintiffs in the first suit. *Pigott v. Pigott*, 873.

See ACTIONS, RIGHT AND CAUSE.

LANDLORD AND TENANT.

Landlord's right to preference. Statute.

Under Code 1906, section 2851, providing that no goods in or upon any leased premises shall be liable to be taken by virtue of any writ of execution or other process whatever unless the party

LARCENY—LAWS 1908.

LANDLORD AND TENANT—Continued.

so taking the same shall before the removal of the goods or chattels from such premises pay or tender to the landlord or lessor thereof all unpaid rent for said premises, etc., the landlord of a store house had a lien or preference claim to the goods or on the proceeds of the sale of them and had the right to have his claim for two months declared a preference claim against the estate of an insolvent tenant and to have the administrator required to pay it in full out of the proceeds of a sale of decedent's stock, pursuant to an order of the chancery court, though the landlord did not assert his claim within thirty days after the removal of the goods from the leased premises pursuant to a sale by such administrator. *Epstein v. Farr*, 530.

LARCENY.

1. *Trespass less than larceny. Taking hog. Statute.*

Where defendant assisted the owner of a cornfield, to take up and pen a hog belonging to another, which was depredating in said field, and the owner of the field demanded of the owner of the hog, fifty cents for taking it up which he refused to pay, and thereupon defendant bought the hog from the party taking it up and offered the hog to its owner for fifty cents. In such case he was not guilty of violating Code 1906, section 1264, which provides, that any person who shall, without the owner's consent, take and carry away any hog, etc., where the taking and carrying away does not amount to larceny, shall be fined or imprisoned, but that the section shall not apply to any one who takes property believing in good faith that he has a right to it, since in such case there was nothing wrongful in the taking up of the hog but it was taken up in good faith. *Husbands v. State*, 17.

2. *Evidence Sufficiency.*

Under the facts in this case the court held that the evidence was not sufficient to show beyond all reasonable doubt the guilt of the defendant of the larceny charged. *Bowman v. State*, 786.

3. *Evidence. Sufficiency.*

Under the facts as set out in the opinion the court held that a conviction for larceny of a steer could not be sustained. *Dillard v. State*, 826.

LAWS 1908.

LAWS 1910—LAWS 1912.

LAWS 1910.

- Ch. 110. Animals. Tax or license. Constitutional provisions. Equal protection of the law. Dog tax. Evidence. Judicial notice. Ex post facto law. Imprisonment for debt. Repeal of law. *State v. Widman*, 1.
- Ch. 115. Wills. Bequest. "Religious or ecclesiastical corporation or association." *Hailey v. McLaurin's Estate*, 706.
- Ch. 148. Constitutional law. Ex post facto law. Dog tax. *State v. Widman*, 1.
- Ch. 178. Criminal law. Prosecution. Repeal of law. *Id.*

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- Ch. 113. Taxation. Refrigerator cars. Earnings. Constitutional provisions. Special mode of valuation and assessment. Equal protection of law. Uniform and equal. Burden upon interstate commerce. *Packing Co. v. Stovall*, 106.
- Ch. 120. Municipal corporations. Ordinances extending limits. Appeal statute. *Gregory v. City of Amory*, 640.
- Ch. 158. Municipal corporations. Ordinances extending limits. Appeal statute. *Id.*
- Ch. 260. Statutes. Amendment. Constitutional provisions. "To be amended as follows." Municipal corporations. Street improvement. Notice. *Bryan v. City of Greenwood*, 718.

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- Ch. 110. Taxation. Equality. Property tax. Constitutional provisions. *Thompson v. McLeod*, 383.
- Ch. 112. Licenses. Discrimination. Statute. Validity. Privilege tax. Persons liable. Agent. *State v. Romback*, 737.
- Ch. 118. Schools and school districts. School taxes. Duty of collector. *Town of Carrollton v. Vance*, 773.
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- Ch. 176. Counties. Bonds. Statutes. Sufficiency. Limitations. *Rosenstock v. Board of Sup'rs*, 124.
- Ch. 520. Injunction. Right to injunction. Persons entitled. Irreparable injury. *Power v. Ratliff*, 88.

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LAWS 1916.

- Ch. 90. Licenses. Tax on undertakers. "Undertaker." Statutes. *Smith v. Perkins*, 870.
- Ch. 92. Corporations. Foreign corporations. Filing charter. Statute. Now doing business within the state. Construction. Retroactive effect. *Power v. Mortgage Co.*, 319.
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- Ch. 128. Constitutional law. Municipal corporations. Due process of law. Notes. Special assessments. Statutes. *Bouslog v. City of Gulfport*, 184.
- Ch. 136. Indictment and information. Sufficiency. Following language of statute. Railroads. Regulations. Posting of anti-tipping statute. *State v. Southern Ry. Co.*, 23.
- Ch. 159. Constitutional law. Initiative and referendum amendment retroactive application. Habeas corpus. Appeal. Scope of review. *Ex parte Jones*, 27.
- Ch. 174. Counties. Bonds. Limitations. *Rosenstock v. Board of Sup'rs*, 124.
- Ch. 177. Counties. Highways. Improvement. Powers of supervisors. Statutes. *Ellis v. Donnell*, 129.
- Ch. 424. Statutes. Local and special acts. Highway improvements. Powers of board. *Robertson v. Board of Sup'rs*, 54.
- Ch. 527. Statute. Partial invalidity. *Hatten v. Bond*, 590.

LEGISLATIVE POWER.

1. *Constitutional law. State revenue agent.*
The office of state revenue agent is a legislative and not a constitutional office. The legislature has the unquestioned right at any time to prescribe the duties of this officer or to curtail his power or it may abolish the office altogether. *Johnson v. Reeves & Co.*, 227.
2. *Same.*
An office is not a contract, and the incumbent has no vested interest in the term, fees, or emoluments thereof. *Ib.*
See STATUTES AND STATUTORY INSTRUCTION.

LIABILITY.

1. *Chattel mortgage. Trust deeds. Liability of third persons.*
Under the facts set out in this case the court held that the question of liability of defendant was a question for the jury. *Maria v. Levy*, 77.

LIABILITY.

LIABILITY—Continued.

2. *Partnership. Liability on note. Ratification.*

Where the managing partner of a partnership business had full authority to contract debts and borrow money to carry on such business, and did so with the knowledge of his copartner, and the money borrowed from plaintiff bank, was used to pay the debts of the partnership in the regular course of its business and inured to the personal benefit of the copartner in paying the necessary expenses and debts of the business which otherwise he would have had to ultimately pay and such copartner did not object or protest, but impliedly acquiesced therein, in such case the copartner ratified the loan and became liable on the note given therefor, though he had previously notified the plaintiff bank not to loan money to the partnership. *Bank v. Ethridge & Hardee*, 208.

3. *Carriers. Ejection of passengers. Demand for fare.*

Where an ignorant negro woman boarded a railroad train with an order for a ticket sent her by her husband which resembled a ticket and which she ignorantly believed to be a ticket was put off by the conductor after taking up the order and without first demanding that she pay her fare or get off at a station and buy a ticket, the railroad company was liable in damages, since she was a passenger acting in good faith. *Jones v. Railroad Co.*, 283.

4. *Interstate commerce. Commission. Authority.*

As to whether a stipulation on a telegraph blank limiting the telegraph company's liability to fifty dollars, in the absence of greater expressed valuation of the message, is reasonable or unreasonable, valid or void, is a matter to be determined by the Interstate Commerce Commission and not by the state courts and even if such stipulation ought to be unenforceable, nevertheless the state courts cannot so decide it. *Telegraph Co. v. Showers*, 411.

5. *Insurance. Mutual benefit insurance. Appeal and error. Record. Presumption.*

Under a mutual benefit insurance policy, providing for the payment of a sum equal to the total assessments of members who shall meet their assessments and not to exceed one thousand dollars, the liability is *prima-facie* one thousand dollars and in case of a suit on such policy the burden of proof would then rest upon the association, in the event it desired to reduce the amount claimed by the insured under the policy, to allege and prove that the sum collected from its members by the assessment was less than one thousand dollars, since such fact is peculiarly, within

LIABILITY.

LIABILITY—Continued.

the knowledge of the officers of the benefit association. *Woodman Benefit Assn. v. Ivy*, 494.

6. *Insurance. Mutual benefit insurance.*

In a suit on such a policy the declaration for recovery thereon need not allege failure or refusal to make the assessment, or that if the assessment were made the full amount would have been collected. *Ib.*

7. *Insurance. Accident insurance. Construction. "Work of any kind."*

Under an accident policy providing for weekly payments so long as insured was unable to do "work of any kind," the liability of the company only continues until plaintiff is able to do some work, either light or heavy for which he was fitted by nature, experience or training and the burden is upon him to show that he was unable to do any work at all of which he was capable. *Insurance Co. v. Jones*, 506.

8. *Cost. Liability of successful party. Jury tax. Statutes.*

Under Code 1906, section 954, making a successful defendant liable for all cost accrued at his instance, and not paid or collected from the other party where no property of plaintiff could be found, a successful defendant is liable for the jury tax of three dollars imposed by section 700 of the Code, since such tax is only imposed where a plea is filed and the defendant by his affirmative act in filing a plea causes the cost to accrue. *Railroad Co. v. Mitchell*, 560.

9. *Insurance. Casualty insurance. Defense of suit.*

Under an employer's liability insurance policy requiring the insurer to defend any suit of which notice should be given, excepting liability for any expense incurred by insured not specifically authorized by the insurer in writing, where the insurer declined to defend a suit after notice, it was liable for the expenses incurred by the insured in his successful defense of such suit. *Fire Ins. Co. v. Hand-Jordan Co.*, 565.

10. *Sheriffs and constables. Failure to levy execution.*

LIABILITY.

LIABILITY—Continued.

got possession of the warrant it was delivered to a third party under an assignment and in a suit between the sheriff and such assignee the warrant was awarded to the assignee. In such case there was a failure on the part of the sheriff to levy the execution and the judgment creditor was entitled to damages against him for his neglect. *Mulford v. Roberts Sheriff*, 573.

11. *Counties. Officers. Liability for illegal acts. Who may sue.*

Under Code 1906, section 346, providing that if a board of supervisors shall appropriate any money to an object not authorized by law, the member of the board who did not vote against the appropriation shall be liable personally for such sum of money, to be recovered by suit in the name of the county, or in the name of any person who is a taxpayer who will sue for the use of the county, and who shall be liable, for cost, the taxpayer's right is fixed by the statute and if the object of the appropriation was lawful the taxpayer's suit must fail, and an averment in the declaration charging corruption will not confer upon such taxpayer a right to maintain the action. *Weissinger v. Davis*, 625.

12. *Partnership debt.*

A partner is individually liable for the debts of a partnership. *Bank of Tupelo v. Hulsey*, 632.

13. *Partnership. Collateral. Proceeds. Application.*

Even though plaintiff had an individual interest in the proceeds of a note, pledged by a joint owner without plaintiff's knowledge or consent and over his protest, with the defendant bank for its loan to a partnership, and if at the time the bank collected the proceeds, plaintiff was liable to the bank for past due partnership obligations, then the bank had a right to apply the separate interest of plaintiff toward liquidating the partnership liability, and after the money had been so applied plaintiff could not maintain an action to recover the same. *Id.*

14. *Same.*

In such action before plaintiff could recover on the theory of money had and received by the bank for his use and benefit he was required to show that he was not a partner in the firm pledging the note. *Id.*

15. *Taxation. Liability of holder of legal title. Personal property.*

The lessor of a soda fountain, being the holder of the legal title thereof, is liable for the personalty tax thereon. *Robertson v. Mfg. Co.*, 890.

LICENSES.

LIABILITY—Continued.

16. *Taxation. Personal liability. Owner. Contract to assume. Effect.*
When the taxing board discovers the owner of the legal title, its duties are performed when it assesses the property to such owner, without regard to the equities which may exist between the owner and his lessee. *Robertson v. Mfg. Co.*, 890.

See ACTIONS, RIGHT AND CAUSE; DRAINAGES.

LICENSES.

1. *Privilege tax on automobiles. Statute.*
Municipalities cannot impose a privilege tax on motor vehicles, since they are forbidden to do so by section 15, chapter 120, Laws 1914. *Hiler v. City of Oxford*, 22.
2. *Discrimination. Statute. Validity.*
Section 1, chapter 112, Laws 1914, imposing a privilege tax of two thousand dollars upon money loaning business, where a greater rate of interest than 20 per cent. per annum is charged, is not violative of any provision of the state or federal Constitutions, either because the tax therein provided is composed only on a business wherein a greater rate of interest than 20 per cent. per annum is charged, or because the tax is imposed only on a business made unlawful by another statute. *State v. Romback*, 737.
3. *Same.*
Liability under section 1, Laws 1914, chapter 112, depends solely on that section and is not affected by the invalidity of other sections of the act, since this section is complete in itself and the act provides that if any section or part of the act shall be held to be unconstitutional or invalid, that fact shall not invalidate any other part of the act. *Ib.*
4. *Privilege tax. Persons liable. Agent.*
Under Laws 1914, chapter 112, section 1, imposing a privilege tax of two thousand dollars upon money loaning business, where a greater rate of interest than 20 per cent. per annum is charged, the manager and agent of the person conducting the business, who has no interest in the business is not liable for the tax. *Ib.*
5. *Tax on undertakers. "Undertaker." Statutes.*
Under Laws 1916, chapter 90, requiring each dealer in coffins, if an undertaker, to pay one hundred dollars for a privilege license but providing that a merchant carrying coffins in stock and paying a privilege license on the stock shall pay a tax of five dollars in addition to the tax required of him as a merchant; where a merchant carries a stock of coffins in addition to his other stock and takes charge of dead bodies and prepares them

LIEN—LIFE ESTATE.

LICENSES—Continued.

for burial and does all things necessary to constitute him an undertaker, he is liable to the tax of one hundred dollars without reference to whether he sells merchandise or not. *Smith v. Perkins*, 870.

LIEN.

1. *Landlord and tenant. Landlord's right to preference. Statute.*

Under Code 1906, section 2851, providing that no goods in or upon any leased premises shall be liable to be taken by virtue of any writ of execution or other process whatever unless the party so taking the same shall before the removal of the goods or chattels from such premises pay or tender to the landlord or lessor thereof all unpaid rent for said premises, etc., the landlord of a store house had a lien or preference claim to the goods or on the proceeds of the sale of them and had the right to have his claim for two months declared a preference claim against the estate of an insolvent tenant and to have the administrator required to pay it in full out of the proceeds of a sale of decedent's stock, pursuant to an order of the chancery court, though the landlord did not assert his claim within thirty days after the removal of the goods from the leased premises pursuant to a sale by such administrator. *Epstein v. Farr*, 530.

2. *Allowance to widow. Priority. Judgment lien.*

The right of a widow to the allowance of one year's provision from the estate of her deceased husband given by section 2052, Code 1906 is superior to the lien of a judgment creditor of her husband although such judgment was enrolled before her husband died. *Bank v. Donald*, 681.

LIFE ESTATE.

1. *Wills. Estate created.*

Where by will a testator devised all of his estate to his wife so long as she remained his widow, but provided that if she married she should have one-half thereof during life and the remainder to her children, but, if there were no children then to the testator's relatives, and that if she married, one-half of the estate should immediately go to his same relatives. In such case the widow did not take a conditional fee, but at best a mere life estate and on her death without children her relatives took nothing. *Hale v. Neilson*, 291.

LIMITATION OF ACTIONS.

LIFE ESTATE--Continued.

2. *Wills. Estates created.*

Such will although it devised the remainder only on a condition which never happened to wit: the widow's remarriage, passed the estate on her death to the testator's relatives named in his will. *Hale v. Neilson*, 291.

LIMITATION OF ACTIONS.

1. *What law governs.*

The statute of limitations of this state controls where suit is brought in this state upon a promisory note made in Ontario, Canada. *Philip v. Hicks*, 581.

2. *Acknowledgment of debt.*

In order to take a case out of the statute of limitations, an express acknowledgment of the debt as a debt due at that time, or an express promise to pay it, is necessary. *Ib.*

3. *Acknowledgment of debt. Admission to procure compromises.*

An admission contained in a writing the purpose of which is to procure a compromise of a barred demand, does not operate as an acknowledgment of the debt so as to remove the bar of the statute. *Ib.*

4. *Acknowledgment of debt. Certainty and definiteness.*

Where a debtor whose debt had become barred by limitation wrote a letter stating that the note had been brought to his attention and had thought it had been paid, and continuing "but as I noted that the note has not been stamped with any cancellation stamp same certainly must still be unpaid" and offering to settle for a lump sum such letter was not sufficient to remove the bar of the statute, since there was no express and definite acknowledgment of the debt nor any express promise to pay it. *Ib.*

5. *Action on life insurance policy.*

Where one insured under a policy providing for the payment to the beneficiary "upon receipt and approval of proofs of death," disappeared, and the insurance company, being notified, declined to send blanks for proofs of death, taking the position that insured was alive, and sent a detective to investigate and after the expiration of seven years the insurance company did furnish such blanks, but declined to pay the claim. In such case in an action on the policy although the jury found that death occurred the day of disappearance, yet the cause of action was not barred by the six year statute of limitations, under Code 1906, section 3097, since the wording of the policy of insurance gave to the beneficiary a reasonable time within which to make

MANSLAUGHTER—MUNICIPAL CORPORATIONS.

LIMITATION OF ACTIONS—Continued.

out proofs of death, and in such case a reasonable time, and in fact the only time, in which the beneficiary could make out such proofs was at the expiration of the seven years, when the beneficiary under Code 1906, section 1914, could take advantage of the presumption of death then arising. *Life Ins. Co. v. Brame*, 828.

MANSLAUGHTER.

See HOMICIDE.

MORTGAGE.

Deed as mortgage. Parol evidence. Cancellation of instruments. Suit to cancel deed. Relief. Sequestration.

The grantors of a deed, on the trial of their suit to cancel the deed on the theory that it was intended to be a mortgage or that they were by a separate instrument accorded the right to repurchase, had the right to show by parol evidence that the deed was intended to operate as a mortgage where they remain in possession after the giving of the deed. *McGehee v. Weeks*, 483.

See CANCELLATION OF INSTRUMENTS.

MINORS.

See INFANTS.

MOTOR VEHICLES.

Licenses. Privilege tax on automobiles. Statute.

Municipalities cannot impose a privilege tax on motor vehicles, since they are forbidden to do so by section 15, chapter 120, Laws 1914. *Hiler v. City of Oxford*, 22.

MUNICIPAL CORPORATIONS.

1. *Ordinances. Appeal. Questions of law.*

Under Code 1906, section 40, paragraph 2, providing for appeals by the state or a municipality from a judgment in the circuit court acquitting the defendant, where a question of law has been decided adversely to the state or municipality, where a defendant was acquitted before the circuit court on a charge of violating a city ordinance, the case by agreement being tried before the circuit judge, who decided that the evidence "did not show the offense charged in the affidavit," and discharged the defendant, in such case the record does not present a question of law within the meaning of said code section and the city was not entitled to appeal. *City of Jackson v. Harland*, 41.

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—Continued.

2. *Violation of ordinances. Sentence. Costs.*

Where a defendant was convicted under a city ordinance of carrying concealed weapons, it was error to sentence him to "stand committed to the county farm until all costs are paid," there being no authority of law for such a sentence. *Webb v. City of Vicksburg*, 53.

3. *Constitutional law. Due process of law. Notes. Special assessments. Statutes.*

Chapter 128, Laws 1916, being an act to authorize boards of supervisors and the mayor and board of aldermen or other governing bodies of municipalities to erect sea walls, breakwaters, and bulkheads for protection of public roads or streets extending along the beach or shores of any body of water and to lay special assessments on abutting property not to exceed one-half of the cost of construction, and to issue bonds therefor, and empowering the mayor, and commissioners of the city to prorate the assessment without any express rule therefor, and which does not provide for notice to owners either personally or by publication, to afford opportunity of hearing on and objection to the assessments, though section 7 of the act permits any person aggrieved by the order of any board to take bill of exceptions to the circuit court for trial on the record without a jury and in the absence of any such provision in the general law, is violative to both the state Constitution providing that no one shall be deprived of property, etc., except by due course of law, and that every person for an injury done him in his lands, etc., shall have a remedy by due course of law and to the similar provisions of the Federal Constitution; and the court could not say that the power granted to boards, etc., impliedly carried the right to prescribe the notice to be given nor that the bond issue could be upheld, regardless of the legality of the assessments. *Bouslog v. City of Gulfport*, 184.

4. *Waters and water courses. Municipal water supply. Covenant running with the land. Penalty for violating regulation.*

A contract by a city owning water works to furnish a landowner with water on certain premises, is a covenant running with the land and as long as such owner owned the premises he had a right, while subscribing to reasonable regulations made by the city, to be furnished with water and this right would not be cut off because he was delinquent in the payment of his water rent, though during the time of such delinquency the city had a right to cut off his water supply until the rent in arrears was paid. *Carmichael v. City of Greenville*, 426.

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—Continued.

5. *Municipal water supply. Penalty for violation of regulation.*

The regulation of the city in such case requiring the payment of one dollar in addition to delinquent water rent for failure to pay the water rent promptly was unreasonable and void. *Ib.*

6. *Streets. Encroachments. Estoppel of city.*

Where complainant's predecessor in title owned a triangular lot at the intersection of two streets and desiring to erect a building thereon employed a contractor to erect such building who obtained a permit from the clerk of the city but was told by him that before the building could be erected it would be necessary for the city engineer to establish the street lines at that point and accordingly the city engineer did establish such street lines, but erroneously placed the street line on one of the streets several feet over the true and correct line. In such case where the building was erected on the line given by the city engineer and extended several feet into the street, the city was estopped from injuring or damaging the building while it stood on the strip of ground in the street, but the public was not divested of title to such strip, and complainant's only right was to have its possession quieted and confirmed so long as the will might stand on the strip. *City of Jackson v. Bank & Trust Co.*, 537.

7. *Ordinances extending limits. Appeal statute.*

Where a city formerly operating under chapter 99 of the Code of 1906, after the passage of the commission government (chapter 120, Laws 1912), adopted the commission form of government and after coming under commission form of government proceeded to extend the limits of the city under section 3301 of Code 1906, chapter 120, Laws of 1912, providing no scheme for extending corporate limits; an appeal from an ordinance making such extension lies to the circuit court on compliance with section 3303 of the code and such appeal should not be dismissed on the theory that section 18 of chapter 120, Laws 1912, suspended or superseded sections 3303 and 3304 as to cities under commission form of government since the referendum provision contained in chapter 120, Laws 1912, and chapter 158, Laws 1912, do not affect the code sections on appeals in such cases. *Gregory v. City of Amory*, 604.

8. *Street improvement. Ordinances. Description.*

Where a city ordinance providing for paving was incomplete for the reason that it provided "that said paving be done with any one of the following materials to wit: Bitulithic, creosoted wooden blocks, or vitrified brick." This defect if such it was, was remedied by a subsequently adopted ordinance, providing that the

MURDER—NEGLIGENCE.

MUNICIPAL CORPORATIONS—Continued.

paving be done with creosoted wooden blocks. *Bryan v. City of Greenwood*, 718.

9. *Same.*

In such case if the first ordinance was incomplete a property owner had the statutory period after the publication of the second ordinance, in which to file a protest against the proposed improvement. *Ib.*

10. *Street improvement. Notice.*

Since Laws 1912, chapter 260, in relation to public "improvements," does not require notice to property owners other than that contained in the publication of an ordinance passed under the statute, which allows a property owner 30 days in which to do the work of a proposed improvement abutting his property, and Code 1906, section 3412, providing for such notice, was not brought forward in the statute, a property owner could not complain that no notice was given him by the city to lay the pavement himself. *Ib.*

11. *Street improvements. Right of property owner to make.*

Since no duty is imposed on the Legislature by the Constitution to permit property owners to make special improvements themselves and such a provision could have been omitted altogether from the statute, the question whether the 30 days allowed property owners under the statute to do the work themselves, is a sufficient length of time to enable them to do so, is wholly immaterial. *Ib.*

12. *Street improvement. Ordinance.*

Where an ordinance providing for street improvement was duly published, a property owner cannot resist payment of his assessment on the ground that he failed to protest against the improvement; because he thought the city intended to pay the entire cost thereof itself and charge no part thereof to the property owners, for the reason that it adopted an ordinance providing for the issuance of bonds for the purpose of obtaining money with which to pay for improvements on several of its streets on one of which defendant's property was located. *Ib.*

MURDER.

See HOMICIDE.

NEGLIGENCE.

1. *Question for jury. Peremptory instruction.*

In an action for personal injury alleged to have been caused by the negligence of the defendant where the fact as to whether

 NEGLIGENCE.

NEGLIGENCE—Continued.

- or not defendant was guilty of negligence was disputed, the case should have gone to the jury. *Gilchrist-Fordney Co. v. Price*, 20.
2. *Carriers. Actions for injuries. Punitive damages.*
Gross negligence cannot be built up by the addition of two acts of simple negligence. *Light & Traction Co. v. Taylor*, 60.
 3. *Same.*
In order to justify the imposition of punitive damages there must be some willful or wanton wrong or such gross negligence as imputes willful disregard of plaintiff's rights. *Ib.*
 4. *Telegraphs and telephones. Sufficiency of evidence. Punitive damages. Willful negligence.*
Under the facts set out in its opinion the court held that the acts complained of constituted mere negligence on the part of the defendant, not characterized by wantonness or willful wrong. *Telegraph Co. v. Koonce*, 173.
 5. *Physicians and surgeons. Action for negligence. Defense. Evidence Admissibility.*
Unexplained, the leaving of a four inch rubber tube in a patient's body by a physician until the wound healed over was negligence in the treatment of his patient. *Saucier v. Ross*, 306.
 6. *Same.*
In such case it was no answer to the patient's suit for damages, that the rubber tube may have been left in plaintiff's wound by an attendant nurse or another physician in the hospital, where the defendant was her physician and operated on her and attended her while in the hospital and the other physicians were acting under defendant's directions in the treatment of her and defendant discharged her from the hospital at the time she left. *Ib.*
 7. *Same.*
In such case the fact that plaintiff and her husband after the discovery that the rubber tube had been left in her body telegraphed defendant their good wishes and sent him a Christmas card, should not have been admitted in evidence, since such fact does not tend to show that the plaintiff's version of her troubles was not true nor does such a courtesy show a condonation of her grievance. *Ib.*
 8. *Deeds. Incapacity.*

NEGOTIABLE INSTRUMENTS—NOTICE.

NEGLIGENCE—Continued.

Interest under the will, and such devisee at the time of making such deed was not drunk or incapable of transacting business, he could not complain of his own negligence in not learning of his interest under the will to set aside and cancel his deed. *Caulk v. Burt*, 660.

NEGOTIABLE INSTRUMENTS.

Bills and notes. Negotiability. Note payable to bearer. Bona-fide purchaser. Presumption. Defenses. Payment to person not in possession. Estoppel. Failure to assert title. Pleading. Necessity.

A note payable to bearer is a negotiable instrument to which the title passes by a delivery of the note and the holder is presumed *prima facie* to be the *bona-fide* owner of it. *Silvey v. Williamson*. 276.

NOTICE.

1. *Injunction. Notice of writ. Necessity.*

For an injunction to be binding it is not necessary that the defendant be served with the writ or otherwise officially notified of its existence. It is sufficient if he has received actual notice that an injunction has been issued against him. *Fisher v. Ins. Co.*, 30.

2. *Counties. County bonds. Publication.*

Where the notice of an election for a road bond issue, was the publication in newspapers of the county, for four weeks of the order of the board of supervisors calling the election and also the publication for the same length of the time of the notice of the election given by the election commissioners of the county, the law was fully complied with. The statute does not prescribe any specific form of notice and such publication of notice fully advised the electors of the proposed elections. *Rosenstock v. Board of Sup'rs*. 124.

3. *Counties. Road bonds. For three weeks next preceding.*

Notice by a board of supervisors of its intention to issue bonds of a road district, was not published as required by Laws 1910, chapter 149, section 2, which requires that the notice shall be published for "three weeks next preceding the meeting at which the board proposes to issue bonds," where more than one week intervened between the last publication and the day fixed for the proposed action of the board, although notice was published for three consecutive weeks. *Lay v. Shores*, 140.

NOTICE.

NOTICE—Continued.

4. *Constitutional law. Drains. Assessment. Due process of law. Assessments. Confirmation. Venue. Power of Drainage commissioners.*

Under section 1700, Code 1906, as amended by Laws 1912, chapter 196, section 4, providing that, when drainage commissioners have completed their assessment, they shall file it with the clerk of the chancery court, and that the clerk shall publish a notice at least once a week for two successive weeks of the time set for hearing objections to assessments before the chancellor which time shall not be less than fifteen days or more than thirty days from the time of filing; such a notice is reasonable and valid. *Simmons v. Drainage Dist.*, 200.

5. *Insurance. Casualty insurance. Construction of policy. Defenses of suit. "Immediate notice."*

Under an employer's liability insurance policy, which provided that the insurer would at its own expense investigate all accidents and defend all suits of which notices were given to it and that immediate notice of any accident and of any suit resulting therefrom should be forwarded to it, where insured failed to give "immediate notice" of the accident, which means notice within a reasonable time under all the facts and circumstances but did give immediate notice of an intended suit against it about sixty days after the accident, which enabled the insurer to investigate the claim, in such case it was the insurer's duty to defend the suit at its own expense and when it failed to do so, it was the duty of the insured to defend the suit at the expenses of the insurer. *Fire Ins. Co. v. Hand-Jordan Co.*, 565.

6. *Municipal corporations. Street improvement.*

Since Laws 1912, chapter 260, in relation to public "improvements," does not require notice to property owners other than that contained in the publication of an ordinance passed under the statute, which allows a property owner 30 days in which to do the work of a proposed improvement abutting his property, and Code 1906, section 3412, providing for such notice, was not brought forward in the statute, a property owner could not complain that no notice was given him by the city to lay the payment himself. *Bryant v. City of Greenwood*, 718.

7. *Insurance. Employee's fidelity. Insurance. Agents.*

It was the duty of his employer to examine the bond and famil-

 OFFICE—OFFICERS.

NOTICE—Continued.

8. *Discovery. Sufficiency. Statute.*

Under section 1944, Code 1906, providing that if witnesses whose testimony is to be perpetuated are within the state, notice of the filing of a statement touching the matter as to which such testimony is desired, the names of the witness to be examined, the time and place of taking this testimony, shall be given to those represented in the statement as adverse parties in interest, a notice that a corporation through its officers "are required to answer, as provided by this section the following interrogatories," was not a proper notice and in such case neither the corporation nor its counsel was thereupon called upon to answer such interrogations under section 1938, which relates to obtaining the testimony of a nonresident party. *Surety Co. v. Rieves*, 747.

9. *Bankruptcy. Preferences. Recovery.*

Payments made by an insolvent debtor are not recoverable as preferences, unless, at the time they were made the creditor to whom such payments were made had actual knowledge or constructive notice of the insolvency of the debtor. *Milling Co. v. Powers*, 798.

10. *Vendor and purchaser. Innocent purchaser. Record notice.*

A purchaser of land is not charged with constructive notice of the recitals of deeds of trust thereon which do not appear in his chain of title. *Barksdale v. Learnard*, 861.

11. *Vendor and purchaser. Innocent purchaser. Duty of inquiry.*

That a purchaser of land had actual knowledge of a deed of trust thereon, imposed upon him no duty of inquiring into the state of the title, other than that with which he was charged by reason of such deed of trust being of record. *Id.*

12. *Vendor and purchaser. Innocent purchaser.*

A purchaser from an innocent purchaser stands in the position of an innocent purchaser, irrespective of notice. *Id.*

See CONTRACTS; DAMAGES; PRINCIPAL AND AGENT; TRUSTS.

OFFICE.

Circuit judge. Removal of stenographer. Term of office.

Under chapter 135, Code 1906, providing for the appointment of court stenographers, the circuit judge cannot arbitrarily remove his stenographer, he being a public officer and holding for a term of four years. *Ex Parte Brown*, 236.

See CONSTITUTIONAL LAW.

OFFICERS.

See ACTIONS, RIGHT AND CAUSE; COUNTIES.

ORDINANCES—PARTITION.

ORDINANCES.

1. *Municipal corporations. Street improvement. Description.*

Where city ordinance providing for paving was incomplete for the reason that it provided "that said paving be done with any one of the following materials to wit: Bithulithic, creosoted wood-on blocks, or vitrified brick." This defect if such it was, was remedied by a subsequently adopted ordinance, providing that the paving be done with creosoted wooden blocks. *Bryan v. City of Greenwood*, 718.

2. *Same.*

In such case if the first ordinance was incomplete a property owner had the statutory period after the publication of the second ordinance, in which to file a protest against the proposed improvement. *Ib.*

See SENTENCE.

OWNERSHIPS.

1. *Taxation. "Privilege." "Property." "Right of ownership." Value. Statute. Validity. Privilege tax.*

Property may also be and under section 112, Constitution 1890, requiring property to be taxed according to its value, is used to signify "things owned." In order that a thing may be owned, some one must, of course, have a right to ownership thereof. *Thompson v. Kreutzer*, 165.

2. *Same.*

A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. *Ib.*

PARTIES.

Venue. Change. Defendant's residence.

Where a suit against the state and several other defendants was dismissed as to the state and none of the other defendants lived in the county where the suit was brought, the venue was properly changed to the county, of the residence of the principal defendant. *Export Co. v. State*, 452.

PARTITION.

Right to maintain. Possession of legal title.

An instrument of writing signed by an heir under a will which combines a contract for professional service, a power of attorney and security for a fee, but fails to convey any legal title to

PARTNERSHIP.

PARTITION—Continued.

property, is not a sufficient basis for an action for partition by the attorney to whom such instrument was given against such heir.
Wright v. Bowers, 516.

PARTNERSHIP.

1. *Actions. Pleading and proof. Variance.*

Where a declaration alleged that the defendants were partners in a contract for the purchase of land, but the testimony showed that the land was purchased by one of the defendants for himself alone, there was a variance between the pleadings and the proof and there could be no recovery, since a plaintiff may not declare upon a joint contract and recover upon a several one.
Wilder v. Harris, 164.

2. *Liability on note. Ratification.*

Where the managing partner of a partnership business had full authority to contract debts and borrow money to carry on such business, and did so with the knowledge of his copartner, and the money borrowed from plaintiff bank, was used to pay the debts of the partnership in the regular course of its business and inured to the personal benefit of the copartner in paying the necessary expenses and debts of the business which otherwise he would have had to ultimately pay and such copartner did not object or protest, but impliedly acquiesced therein, in such case the copartner ratified the loan and became liable on the note given therefor, though he had previously notified the plaintiff bank not to loan money to the partnership. *Bank v. Ethridge & Hardee*, 208.

3. *Partnership debt. Liability.*

A partner is individually liable for the debts of a partnership.
Bank of Tupelo v. Hulsey, 632.

4. *Collateral. Proceeds. Application.*

Even though plaintiff had an individual interest in the proceeds of a note, pledged by a joint owner without plaintiff's knowledge or consent and over his protest, with the defendant bank for its loan to a partnership, and if at the time the bank collected the proceeds, plaintiff was liable to the bank for the past due partnership obligations, then the bank had a right to apply the separate interest of plaintiff toward liquidating the partnership liability, and after the money had been so applied plaintiff could not maintain an action to recover the same. *Ib.*

5. *Same.*

In such action before plaintiff could recover on the theory of money had and received by the bank for his use and benefit he was re-

PASSENGERS—PHYSICIANS AND SURGEONS.

PARTNERSHIP—Continued.

quired to show that he was not a partner in the firm pledging the note. *Id.*

PASSENGERS.

See CARRIERS.

PATENTS.

Public lands. Performance of condition precedent.

Where a statute provided for the issuance of a patent to land on the express precedent condition that a bond should be executed and filed, and such bond was not sufficiently executed, a patent so issued was void. *Becker v. Bank*, 819.

PAYMENT.

Pleading. Necessity.

Under our statute payment is an affirmative defense and should be specially pleaded or notice given of it under the general issue. *Silvey v. Williamson*, 276.

PENALTY.

Municipal water supply. Penalty for violation of regulation.

The regulation of the city in such case requiring the payment of one dollar in addition to delinquent water rent for failure to pay the water rent promptly was unreasonable and void. *Carmichael v. City of Greenville*, 426.

PHYSICIANS AND SURGEONS.

1. *Negligence. Action for negligence. Defense. Evidence. Admissibility.*

Unexplained, the leaving of a four inch rubber tube in a patient's body by a physician until the wound healed over was negligence in the treatment of his patient. *Saucier v. Ross*, 306.

2. *Same.*

In such case it was no answer to the patient's suit for damages, that the rubber tube may have been left in plaintiff's wound by an attendant nurse or another physician in the hospital, where the defendant was her physician and operated on her and attended her while in the hospital and the other physicians were acting under defendant's directions in the treatment of her and defendant discharged her from the hospital at the time she left. *Id.*

3. *Same.*

In such case the fact that plaintiff and her husband after the discovery that the rubber tube had been left in her body tele-

PLEADING AND PRACTICE.

PHYSICIANS AND SURGEONS—Continued.

graphed defendant their good wishes and sent him a Christmas card, should not have been admitted in evidence, since such fact does not tend to show that the plaintiff's version of her troubles was not true nor does such a courtesy show a condonation of her grievance. *Saucier v. Ross*, 306.

PLEADING AND PRACTICE.

1. *Fraudulent conveyances. Allegations of fraud.*

Where a bill in equity charged that the deeds sought to be cancelled, other than the one to a named lumber company were executed without any consideration having been paid therefor by the grantees therein, for the purpose on the part of both the grantors and grantees of hindering, delaying and defrauding the complainant in the collection of its debt, which fact was known to such lumber company when it afterwards purchased the land from the alleged fraudulent grantees, the said lumber company thereby intending to aid in placing the lands still further beyond the reach of the debtor's creditors, such allegations of fraud were sufficient to call for an answer. *McCoy v. Machine Co.*, 7.

2. *Appearance. Special appearance. Plea to jurisdiction. Statute. Injunction. Notice of writ. Necessity. Injunction against suit in another state. Courts. Comity. Judgment. Collateral attack.*

Under Code 1906, section 3946, so providing when a defendant appeared for the purpose of pleading to the jurisdiction of the court it then and there entered its appearance for all purposes, and by such action was only entitled to a continuance of the suit to the next term of court upon its motion. *Fisher v. Insurance Co.*, 30.

3. *Injunction. Notice of writ. Necessity.*

Where plaintiff demurred to defendant's plea in abatement that plaintiff was barred by injunction in another state from suing him, by such demurrer plaintiff admits the existence of the injunction and it was his duty to obey it, irrespective of official notice thereof. *Ib.*

4. *Same.*

If plaintiff did not know of the existence of the injunction until he filed his demurrer to such plea in abatement he will be presumed to have had knowledge of same at least from the time he filed his demurrer. *Ib.*

5. *Execution. Injunction. Default judgment. Pleading and proof.*

Before a court of chancery will take jurisdiction to enjoin an execution based upon a default judgment at law, the complainant

PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

must allege in his bill and prove, if the fact be denied, that he has a good and meritorious defense to the action at law. It is incumbent upon the complainant to set out in his bill, and also prove the fact showing such defense. It is not enough that he merely allege the conclusion of law of such defense. *Welch v. Hannie*, 79.

6. *Partnership. Actions. Pleading and proof. Variance.*

Where a declaration alleged that the defendants were partners in a contract for the purchase of land, but the testimony showed that the land was purchased by one of the defendants for himself alone, there was a variance between the pleadings and the proof and there could be no recovery, since a plaintiff may not declare upon a joint contract and recover upon a several one. *Wilder v. Harris*, 164.

7. *Criminal law. Variance. Objection. Waiver.*

Where an indictment charged defendant with stealing a cow belonging to several parties, but the evidence showed that it belonged to only one of them and died after it was stolen but before the indictment, leaving the other named owners as his heirs at law, the defendant in order to take advantage of the variance between the allegations and the proof should have objected specifically on that ground, whereupon under Code 1906, section 1508, the indictment could have been amended to correspond with the proof, and defendant failing to do this could not avail himself of such variance on appeal. *Smith v. State*, 248.

8. *Designation of pleading.*

The character of complaint or defense is not determined by what it is styled in the pleadings, but by what it in fact is. *Green v. Bounds*, 252.

9. *Payment. Necessity.*

Under our statute payment is an affirmative defense and should be specially pleaded or notice given of it under the general issue. *Silvey v. Williamson*, 276.

10. *Admission. Matter to be proved. Publication. Evidence.*

Where a bill of complaint alleged the publication of an ordinance and this was not denied by the answer, no evidence of such publication was necessary. *Bryan v. City of Greenwood*, 718.

11. *Ejectment. Variance. Statute.*

The effect of section 1827, Code 1906, is to confine the plaintiff in ejectment to a recovery upon the title outlined in his bill of particulars and where plaintiffs in ejectment in their bill of par-

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PLEADING AND PRACTICE

PLEADING AND PRACTICE—Continued.

ticalars deraign title by inheritance from their father who it is claimed acquired title by adverse possession, they are confined to the title thus outlined, and cannot recover by showing a different title derived by inheritance from their mother. *Smith v. Whittington*, 759.

12. *Criminal law. Motion in arrest of judgment. Grounds.*

As "Charity covers a multitude of sins" in the domain of morals, so a verdict of a jury in Mississippi covers a multitude of defects in pleadings; and it is only in cases where the indictment is a nullity, because of insufficiency, that a motion in arrest of judgment can be entertained at all. *Young v. State*, 769.

13. *Judgment. Nunc pro tunc. Power to enter. Conflicting with former judgment.*

When the court under Code 1906, section 802, so providing, after announcing his intention to give a peremptory instruction for the defendant, allowed plaintiff to take a voluntary nonsuit, and such judgment was duly entered, the court could not at a subsequent term render a judgment *nunc pro tunc*, in direct conflict with the one first entered, when no clerical error was shown. *Edwards v. Railroad*, 791.

14. *Same.*

Under Code 1906, section 802, so providing it was proper for the court to allow the plaintiff to take a voluntary nonsuit, where done before the jury retired, even though the court had previously announced its intention to grant a peremptory instruction for the defendant. *Ib.*

15. *Indictment and information. Negating exceptions. Sufficiency.*
An indictment for abortion which avers that it was unlawfully and feloniously done, negatives its lawfulness. *Smith v. State*, 803.16. *Duplicity. Surplusage. Action on life insurance policy.*

Where a suit upon a life insurance policy the declaration alleged insured's seven years absence, which was on demurrer amended so as to charge also that insured was actually dead. Such a declaration was not defective as an attempt to recover in one court for both a common law cause of action and also a cause of action under section 1914, Code 1906, as to presumption of death, because the legal effect of the amended declaration was simply that the insured was dead and the allegation in regard to the seven years absence of insured was surplusage. *Life Ins. Co. v. Brame*, 828.

POLICE POWER—PRINCIPAL AND AGENT.

PLEADING AND PRACTICE—Continued.

17. *Admissions. Effect.*

Where one claiming land adversely was joined as a plaintiff in a bill by the true owner of the land, but in fact had nothing to do with the suit, and did not read the bill, or authorize the other party's attorney to make claim by the bill, except by adverse possession, he was in no way bound by allegations of the bill to a different effect. *Pigott v. Pigott*, 873.

See EQUITY; ACTIONS; RIGHT AND CAUSE.

POLICE POWER.

See CONSTITUTIONAL LAW.

PREFERENCES.

See LANDLORD AND TENANT; BANKRUPTCY.

PRESCRIPTION.

Surface water. Drainage. Knowledge.

The right of drainage across the land of another is not gained by prescription though continued for twelve years, where such drainage was by tile drainage and was unknown to the owner of the lower land. *Holman v. Richardson*, 216.

PRINCIPAL AND AGENT.

1. *Railroad. Injuries. Persons on track. Wood thrown by fireman.*

Where plaintiff was injured while walking on defendant's right of way by being struck by a stick of wood which was thrown off the tender by a fireman for his own use and which wood was being carried on the tender without defendant's knowledge or consent and for the fireman's private benefit, the defendant, railroad company, was not liable for damages so inflicted since the fireman was acting entirely outside of the scope of his employment. *Railroad Co. v. McWilliams*, 238.

2. *Appeal and error. Individual transaction of agent.*

Where defendant gave a written order for flour to plaintiff's agent to be charged to the agent but shipped to defendant, and the order was received by plaintiff, together with a forged order directing that the flour be charged to defendant, and plaintiff, without notifying defendant that it would not ship under the first order, shipped the flour under the forged order, and defendant received and disposed of the flour, believing that it had been charged to the agent who owed the defendant, in such case plaintiff must suffer the loss caused by the act of its accredited agent and cannot recover from defendant for the flour. *Felder v. Acme Mills*, 322.

PRINCIPAL AND AGENT.

PRINCIPAL AND AGENT—Continued.

3. *Banks and banking. Collections. Relation between bank and depositor for collection. Duty to collect in money. Time of payment. Failure to collect. Notice.*

The collecting bank is the agent of the depositors of the claims for collection and it is duty of such collecting bank to collect in money. *Bank of Shaw v. Ransom*, 440.

4. *Same.*

A collecting bank cannot extend the time of payment. *Id.*

5. *Collection. Failure to collect. Notice.*

A collecting bank must use diligence to protect parties who intrust them with the collection of the commercial paper; and such bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customers of such vital condition, and fails to take vigorous methods under the circumstances to secure payment, and if loss occurs by its negligence to exercise that degree of skill, care and diligence which the nature of its undertaking calls for, with reference to the time, place and circumstances surrounding the undertaking, it will incur liability to its principal for the loss sustained. *Id.*

6. *Insurance. Employee's fidelity. Insurance. Agents. Notice.*

Even though the principal in an employee's fidelity bond was a special agent to solicit business for the bonding company, yet in his application for his own bond as well as in his delivery of the bond to his employer he was not acting as the agent of the bonding company or of his employer, but for himself as the principal obligor in the bond and neither the bonding company nor his employer were chargeable with his acts or conduct in the delivery of the bond. *Surety Co. v. Rieves*, 747.

7. *Preferences. Recovery. Knowledge of agents.*

The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal, the rule falls when the circumstances are such as to raise a clear presumption that the agent will not perform this duty, and accordingly where the agent is engaged in a transaction, in which he is interested adversely to his principal, or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein. *Milling Co. v. Powers*, 798.

See NOTICE.

 PRINCIPAL AND SURETY—PROBATE.

PRINCIPAL AND SURETY.

Action on surety bond. Evidence.

In an action by a portrait company on a bond of its district manager given for the faithful performance of his contract, plaintiff made out a *prima-facie* case for recovery when it showed the balance due from the manager and no extension of time without the consent of the sureties or other action releasing them from the bond. *Portrait Co. v. Maddox*, 434.

PRIVILEGE TAX.

Contracts. Validity. Non-payment of tax. Bills and notes. Transfer. Bona fide purchaser. Defenses.

Contracts made by a party who has not paid his privilege tax are valid since April 21, 1906, at which time the statute (Ann. Code 1892, section 3401), declaring all contracts made by a party who had not paid his privilege tax void was amended (Code 1906, section 3894) and the legislature omitted from the statute the provision, declaring contracts void when made by a person who had not paid his privilege tax, and the penalty for such failure was made a fine and imprisonment only. *Huddleston v. McMillan Bros.* 168.

See LICENSES.

PROBATE.

1. *Executors and administrators. Settlement of estate. Approval of claims by clerk. Statute.*

The requirement under Code 1906, section 2106, that the clerk if he approves, shall endorse on a claim against the estate of a decedent the words "probated and allowed for \$— and registered this — day of ——" is mandatory and in the absence of such endorsement the claim is lifeless, but the court if of the opinion that the clerk actually intended to approve and allow the claim had, the power within one year before the claim was barred by the statute of limitations under section 2106 of the Code of 1906, to enter an order, authorizing the clerk to approve and allow the claim under the statute, when however the one year statute of limitations has run, the court and the clerk are both absolutely powerless to breathe the breath of life into the claim. *Stevens v. Mercantile Co.*, 524.

2. *Same.*

The only competent evidence of the probate and allowance of a claim against the estate of a decedent, is the written indorsement of the clerk. *Id.*

PROPERTY—PUBLICATION.

PROBATE—Continued.

3. *Executors and administrators. Probating claim. Affidavit. Statute.*

The affidavit required under Code 1906, section 2106, to probate an account against the estate of a decedent, where there is no written evidence of the debt, must be made by the creditor himself and not by an agent, in such case an affidavit by the agent amounts to no affidavit at all. *Persons v. Griffin*, 643.

4. *Executors and administrators. Probating claims. Authority of court.*

Courts have no right to assume the justice or correctness of any claim offered against the estate of a decedent, until the proposed claim has been duly probated in the manner provided by law. *Id.*

5. *Wills. Custodian. Duty to produce.*

A party having the possession of a will after the death of the testator is a trustee only to the extent that he is the custodian of the will and his duty only extends to producing the will and having it probated. *Caulk v. Burt*, 660.

PROPERTY.

1. *Taxation. "Ownership." "Privilege." "Right of ownership." Value. Statute. Validity. Privilege tax.*

Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. In a strict legal sense property is synonymous with the right of ownership, and means one's exclusive right of possessing, enjoying and disposing of a thing. *Thompson v. Kreutzer*, 165.

2. *Same.*

Property may also be and under section 112, Constitution 1890, requiring property to be taxed according to its value, is used to signify "things owned." In order that a thing may be owned, some one must, of course, have a right to ownership thereof. *Id.*

3. *Taxation. Turpentine leases.*

A turpentine lease is a thing of value—"property" upon the value which the state can levy an *ad valorem* tax. *Thompson v. McLeod*, 384.

PUBLICATION.

See NOTICE.

PUBLIC LANDS—RAILROADS.

PUBLIC LANDS.

Patents. Performance of condition precedent.

Where a statute provided for the issuance of a patent to land on the express precedent condition that a bond should be executed and filed, and such bond was not sufficiently executed, a patent so issued was void. *Becker v. Bank*, 813.

QUIETING TITLE.

Burden of proof. Wills. Estates created. Life estate. Constructions.

Complainants filing a bill to remove cloud from title, bear the burden of their bill and must necessarily prevail upon the strength of their own title, and not upon the weakness of the title of their adversary. *Hale v. Neilson*, 291.

RAILROADS.

1. Indictment and information. Sufficiency. Following language of statute. Regulations. Posting of anti-tipping statute.

Under Laws 1916, chapter 136, section, 3, providing that each dining car, railroad, or sleeping car company, doing business in this state, shall post two copies of the anti-tipping statute in conspicuous places in each passenger coach or sleeping car, while the language of the statute is broad enough to require the posting of the statute in all passenger coaches, not only while actually being used for the transportation of passengers, but also while not in use, but standing idle on the tracks, yet it is clear that its purpose is to make criminal only, the failure to post it in passenger coaches while actually being used for the transportation of passengers and an indictment under this statute which falls to allege this is insufficient. *State v. Southern Ry. Co.*, 23.

2. Taxation. Refrigerator cars. Earnings. Constitutional provisions. Special mode of valuation and assessment. Equal protection of law. Uniform and equal. Burden upon interstate commerce.

Laws 1912, chapter 113, sections 1-8, designating as freight line companies every corporation engaged in the business of operating, furnishing or leasing cars for the transportation of freight on railroad lines in whole or in part within the state not owned or operated by such corporations, and not otherwise listed for taxation, and requiring such corporation to make certain sworn statements to the state auditor, and providing that for purposes of taxation such cars shall have a *situs* within the state, and imposing a tax upon the property of such corporations of three per cent., upon their gross earnings, and providing for the col-

RAILROADS.

RAILROADS—Continued.

lection of such tax, and penalties for failure to furnish a statement or to pay the tax, considered with Laws 1912, chapter 114, taxing equipment companies, includes refrigerator cars, the property of a packing company, used solely for the transportation of its products over railroad lines within and without the state, though it owns or leases no railroad within the state or elsewhere. *Packing Co. v. Stovall*, 106.

3. *Injuries. Persons on track. Wood thrown by fireman.*

Where plaintiff was injured while walking on defendant's right of way by being struck by a stick of wood which was thrown off the tender by a fireman for his own use and which wood was being carried on the tender without defendant's knowledge or consent and for the fireman's private benefit, the defendant, railroad company, was not liable for damages so inflicted since the fireman was acting entirely outside of the scope of his employment. *Railroad Co. v. McWilliams*, 238.

4. *Operation. Noise. Damage.*

Where after the construction of defendant's main line of railroad, plaintiff acquired a residence a short distance from the right of way, and thereafter to furnish facilities to a compress company defendant, over its own property, constructed a spur track leading to the compress, and the business done over this spur track was of the same character as that done at regular freight depots, such spur track was installed to serve the general public, and the act of installation must be characterized as a public and not a private act of the railway company. In such case where there was no complaint or proof that smoke, dust, sparks or cinders were projected by defendant's engines and trains over and upon any of plaintiff's property, but the sole ground of complaint was the noise produced by the orderly operation of the cars, the plaintiff could not recover for injuries caused only by the noise, it being a case of *damnum absque injuria*. *Dean v. Railway Co.*, 333.

5. *Carriers. Personal injury. What law governs. Obstruction appearing on road. Negligence. Question for jury.*

Where plaintiff was injured in Tennessee by being struck by defendant's train while she was trying to flag the train, her right to recovery is based upon the precautionary statutes of that state. *Turner v. Railway Co.*, 359.

6. *Personal injury. Obstructions appearing on the road.*

Under the Tennessee statutes, Shannon's Code, section 1574, providing that every railroad shall keep its engineer, fireman, or

REAL ESTATE—RECORD.

RAILROADS—Continued.

some other person upon the locomotive always upon the look-out ahead, and that when any person or other obstruction appear upon the road, the alarm whistle shall be sounded, the breaks put down and every possible means employed to prevent an accident. Where plaintiff while standing on the railroad track with a lighted paper in her hand flagging the train was struck by a passing train, she was such an "obstruction upon the road" as required the precautionary measures prescribed by said statute. *Id.*

7. *Same.*

The court held that under the evidence set out in the opinion in this case a peremptory instruction for defendant was erroneous. *Id.*

REAL ESTATE.

See LAND AND LAND TITLES.

REAL PROPERTY.

See LAND AND LAND TITLES.

REASONABLE TIME.

1. *Bills and notes. Construction. Time of maturity.*

A purchase money note payable when a given part of the land purchased should be resold by the purchaser is payable after a reasonable time has elapsed for the making of such sale. *Hughes v. McEwen*, 35.

2. *Bills and notes. Maturity.*

Where such note was not paid for four years, a sale under a deed of trust securing the note will not be enjoined on testimony showing that the debtor had made some effort to sell the land, but there was no showing that exceptional circumstances prevented the making of the sale during the four years. *Id.*

RECORD.

Appeal and error. Presumption.

In an action on a mutual benefit policy if it was necessary to produce the original policy, on appeal this will be presumed to have been done, where the record by bill of exceptions or otherwise fails to show that the policy was not produced on the trial. *Woodmen Benefit Assn. v. Ivy*, 494.

See NOTICE.

REFORMATION OF INSTRUMENTS—RELEASE.

REFORMATION OF INSTRUMENTS.

Insurance. Mutual benefit insurance. Reformation of policy to conform to application. Right of beneficiary.

Where a member of a mutual benefit association made out and forwarded an application for life insurance which without his fault was lost and never received by the officers of the Supreme Lodge, and another application was executed and forwarded for him, which recited that it was only an application for a policy, which if granted, would become effective in thirty days after issuance; and a policy was duly issued and delivered which provided that if the member's certificate had not been in force thirty days, no benefit would be allowed in case of illness or death; and the member died less than thirty days from the date of issuance of the policy, in such case his widow, the beneficiary, could not have reformation of the policy so as to change its date to conform to the first application and thus render the benefit association liable. *Mutual Aid Ass'n v. Banks*, 458.

REGISTRATION.

Counties. Creation. Procedure. Registration of voters.

Under Acts 1916, chapter 527, section 15, providing, that the registration books of the county of Harrison shall be the registration books for the purpose of election to be held in the territory embraced in the county of Stone and that the polling places now established in the county of Harrison and embraced in Stone county shall be the voting places for the purpose of holding the election under section 3 of the act. This act was sufficient authority for the purpose of holding the election and the fact that section 15 of the act provides that qualified electors shall be registered ten days before said election, and that the commissioners, if they see proper, may establish other voting precincts, and shall divide the territory into convenient voting precincts, which was not done, does not invalidate the election, as it was discretionary with the commissioners as to the establishing new precincts and to register a person ten days before the election would not qualify him to vote. *Hatten v. Bond*, 590.

REINSURANCE.

See INSURANCE.

RELEASE.

Promise of re-employment. Injuries to servant. Fraud.

Where a railroad engineer being injured, settled with the company for six thousand dollars, and executed a release one year after he received his injuries, which release he claimed was

REPLEVIN—REWARDS.

RELEASE—Continued.

procured by the fraudulent misrepresentations of the company that it would employ him as engineer when he had fully recovered, such representations if made did not render the release void, but at most, only voidable and the engineer cannot disregard it and sue at law on his original cause of action without returning or offering to return the consideration paid him, it is only where the release is void that no tender is necessary. *Smith v. Railroad*, 878.

REPLEVIN.***Peremptory instruction.***

Where a trustee under a deed of trust to secure the purchase price of cattle brought an action of replevin for the cattle covered by the trust deed and there was a conflict in the evidence as to whether the debt secured by the trust deed had been paid, the court should not have given a preemptory instruction for the plaintiff. *Snowden v. Collins*, 801.

RES ADJUDICATA.***Judgment. Parties bound. Success of state land commissioner.***

Where the state land commissioner was perpetually enjoined by a court of competent jurisdiction of the subject-matter and of the person, from conveying to, any person other than complainant the swamp land title of the state to certain land, such decree bound his successor and those claiming under such successor and prevented such successor from making the conveyance so enjoined although the decree itself was erroneous and although it was not *res adjudicata* of the rights of the state. *Finch v. Dobbs*, 73.

REVIEW.***Appeal and error. Questions to be decided.***

The supreme court is not called on to decide the legal aspect of a purely imaginary contingency. *Rosenstock v. Board of Sup'rs*, 124.

REWARDS.**1. *Necessity for knowledge of offer.***

A reward cannot be earned by one who did not know it had been offered; for there can be no acceptance of an uncommunicated offer. *Fidelity & Deposit Co. v. Messer*, 267.

2. *Same.*

The publication of an advertisement offering a reward is a general offer to make a contract with any person who is able to

REWARDS—Continued.

perform the required services and meet the conditions of the proposal. The performance of the service or the performance of the condition on which the promise is made, with knowledge, is an acceptance of the offer, and when done concludes the contract. The matter rests exclusively in the domain of contracts involving an offer and its acceptance. *Fidelity & Deposit Co. v. Messer*, 267.

ROAD DISTRICTS.

See ROADS AND HIGHWAYS.

ROADS AND HIGHWAYS.

1. *Statutes. Local and special acts. Highway improvements. Powers of board.*

Laws 1916, chapter 424, providing for the issuance of bonds to pay for the improvement of public roads in Leflore county does not violate section 90, paragraph L, of the state Constitution, for the reason that it does not provide for the laying out, opening, altering and working roads and highways, but for the raising of revenue with which to pay for the working of roads and highways, the method by which they have been or are to be laid out, opened, altered and worked being governed by the general laws relating thereto. *Robertson v. Board of Sup'rs*, 54.

2. *Highways. Highway districts. Employment of counsel.*

Where a board of supervisors was interested in maintaining the validity of bonds issued by it, in a proceeding to organize a good road district and the road commissioners were interested to defeat the bond issue, so that the interest of the board of supervisors and the interest of the commissioners was in direct conflict, in a suit to sustain the regularity and validity of such bonds the commissioners were entitled to be represented by counsel of their own choosing although the board of supervisors had employed able counsel to represent both sides of the controversy. *Jones v. Lincoln County*, 626.

3. *Highways. Good roads districts. Statute. Construction.*

Under Laws 1914, chapter 176, section 5, in relation to the duty and powers of highway commissions and providing that such commissioners may employ legal counsel if necessary, such board of commissioners are not required to submit contracts for the employment of counsel to the board of supervisors, since the act does not specifically require this to be done, although such act does require that the commissioners submit to the board of supervisors for approval their plans for the establishment and construction of roads. *Ib.*

RULES OF DECISION.

See COURTS.

SALES.

Contract. Excuse for non-performance. Attempted modification.

Where a contract for the sale of peas was fully consummated by a telegram from the buyer to the seller and afterwards the buyer wrote to the seller confirming the telegram but asking for a better grade of peas, this was no defense to an action on the contract first made. *See Co. v. Rauch*, 330.

SCHOOLS AND SCHOOL DISTRICTS.

School taxes. Duty of collector.

Where any municipality, together with separate adjacent annexed territory, constitutes a separate school district, under the provisions of chapter 118, Laws 1914, it is the duty of the municipal tax collector, and not the sheriff, to collect the separate school district taxes levied upon property situated in such separate adjacent annexed territory. *Town of Carrollton v. Vance*, 773.

SELF-DEFENSE.

1. *Instructions. Ignoring defendant's version.*

Where on a trial for homicide, defendant testified that he shot deceased in self defense, but did not know the position of deceased when he fired the last three times because of the smoke. In such case an instruction to find that defendant guilty if he fired after deceased turned his back, and while defendant was in no real or apparent danger at his hands, was prejudicial error as ignoring defendant's version of the shooting and of what occurred at the time. *Leverett v. State*, 394.

2. *Criminal law. Instructions. Undue prominence.*

Where on a trial for homicide the accused depended alone on the ground of self defense, instructions emphasizing the fact that no other defense was involved, where erroneous as disparaging the testimony regarding the cause of the quarrel. *Ib.*

3. *Homicide. Instructions.*

On a trial for homicide where defendant claimed to have acted in self defense, it was prejudicial error to refuse an instruction for the defendant, that the jury might consider a previous threat by decedent to kill accused the next time they met. *Ib.*

4. *Homicide. Instructions.*

In a trial for homicide where accused defended on the ground of self defense, it was error for the court to refuse the defendant an instruction, that a man about to be assaulted with a deadly

SENTENCE—SHERIFFS AND CONSTABLES.

SELF-DEFENSE—Continued.

weapon is not required by the law to wait until his adversary is on equal terms with him, but may rightfully anticipate his action and kill him when to strike in anticipation reasonably appeared to be necessary to self defense. *Leverett v. State*, 394.

SENTENCE.***Municipal corporations. Violation of ordinances. Costs.***

Where a defendant was convicted under a city ordinance of carrying concealed weapons, it was error to sentence him to "stand committed to the county farm until all costs are paid," there being no authority of law for such a sentence. *Webb v. City of Vicksburg*, 53.

SET-OFF AND COUNTERCLAIM.***Application of firm assets. Agreement. Pleading. Designation of pleading.***

Where appellant and his brother were equally interested in a lot of logs and sold and delivered them to appellee under an agreement assented to by all parties interested therein, that one-half of the proceeds thereof should be retained by appellee, the buyer, and applied to the payment of the account due him by appellant, if he failed to so apply these payments, he and not appellants must suffer therefor. *Green v. Bounds*, 252.

SHERIFFS AND CONSTABLES.***Failure to levy execution. Liability.***

Where appellant procured a judgment against his debtor and had an execution issued and placed in the hands of the sheriff with directions to levy on a certain warrant issued by the board of supervisors to the execution debtor, which warrant was then in the custody of the chancery clerk and the sheriff delivered the execution to an unsworn deputy, who went to the office of the chancery clerk and there found the warrant, but did not take the same into his possession as required by Code 1906, section 3964, but pinned the execution to the warrant and before the sheriff got possession of the warrant it was delivered to a third party under an assignment and in a suit between the sheriff and such assignee the warrant was awarded to the assignee. In such case there was a failure on the part of the sheriff to levy the execution and the judgment creditor was entitled to damages against him for his neglect. *Mulford v. Roberts Sheriff*, 573.

STATES.

STATES.

1. *Actions. Liability to suits. Sufficiency of bill. Officers. Authority. Auditor. Involuntary dismissal. Venue. Change. Defendant's residence.*

Under Code 1906, section 4800, so providing, persons having claims against the state must submit them to the auditor before suit and an action cannot be brought upon such a claim which the auditor has no authority to audit and allow. *Export Co. v. State*, 452.

2. *Actions. Sufficiency of bill.*

A bill in equity against the state for alleged breach of a contract made by the governor with the complainant, but not showing any authority on the governor's part to make the contract, does not show a binding contract on the state. *Ib.*

3. *Actions. Officers. Authority. Auditor.*

The auditor of the state has no authority to audit and allow a claim for damages for breach of contract. *Ib.*

4. *Actions. Liability to suit.*

A chancery court has no general equity power to decree what the state should pay for an alleged breach of contract. The authority to sue the state has always been a subject of legislation in this state and the legislature having dealt with and treated the subject, its treatment and its statutory enactment must be regarded as exclusive of any remedy by common law or original equity jurisdiction. *Ib.*

5. *Actions against. Involuntary dismissal.*

Where a bill does not state such a claim for which suit is authorized to be brought against the state in its sovereign capacity, the chancellor is authorized to dismiss such suit, as to the state. *Ib.*

6. *Actions. Liabilities to suit.*

A suit against the land commissioner to recover the purchase price of a tax title subsequently declared void is really an action against the state, in its sovereign capacity and is controlled by section 4800, of Code 1906. *Land Commissioners v. Ford*, 678.

7. *Same.*

Under section 4800, Code 1906, requiring suits against the state to be brought in the court having jurisdiction of the subject matter which holds its session at the seat of government, an action against the state to recover the purchase price of a void tax title was improperly brought in Wilkerson county. *Ib.*

STATUTE OF FRAUDS—STATUTORY CONSTRUCTION.

STATUTE OF FRAUDS.

1. *Promise to pay debt of another. Contracts. Right of action. Promise to pay third party.*

Where R gave K an order for money, under a promise to pay M, to whom R was indebted, a part of it, such promise of K was not a promise to pay the debt of another, within the statute of frauds. *Moore v. Kirkland*, 55.

2. *Same.*

In such case M could sue on the promise of K in his own name although the promise was communicated to M by R alone. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION.

1. *Indictment and information. Sufficiency. Following language of statute. Railroads. Regulations. Posting of anti-tipping statute.*

Where the language of the statute is so specific as to give notice of the act made unlawful, and so exclusive as to prevent its application to any other acts than those made unlawful, it is sufficient to charge the offense by using only the words of the statute, but where the act prohibited does not clearly appear from the language employed, or where, under certain circumstances, one may lawfully do the thing forbidden, by the literal meaning of the words of the statute, it is not sufficient to indict by the use only of the statutory words. *State v. Southern Ry. Co.*, 23.

2. *Same.*

Where the language of the statute is broader than its purpose, and the indictment is in the words of the statutes it cannot be told whether the jury intended to find defendant guilty of the act forbidden by the statute, or of those only, within its literal but not its true construction and in such case it is necessary for the pleader to depart from the statute and indict in words aptly charging, in all cases in which the words of the statute do not by legal intendment import a particular offense certainly committed by one who has violated its literal language. *Ib.*

3. *Local and special acts. Highway improvements. Powers of board.* Laws 1916, chapter 424, providing for the issuance of bonds to pay for the improvement of public roads in Lefflore county does not violate section 90, paragraph L, of the state Constitution, for the reason that it does not provide for the laying out, opening, altering and working roads and highways, but for the raising of revenue with which to pay for the working of roads and highways, the method by which they have been or are to be laid out, opened, altered and worked being governed by the general laws relating thereto. *Robertson v. Board Sup'rs.*, 54.

STATUTES AND STATUTORY CONSTRUCTION.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

4. *Title. Sufficiency.*

Where a statute has a title, its sufficiency was a legislative and not a judicial question. *Rosenstock v. Board of Sup'rs.*, 124.

5. *Constitutional law. Favoring constitutionality. Legislative power. State revenue agent. Vested rights. Obligation of contract's office. Contract. General and special. Taxation. Exemptions. General rules. Dismissal and non-suit. Grounds. Abatement of statute.*

The power to legislate is vested in the legislature and before the court can strike down an act of the legislature as unconstitutional it must put its hands upon the exact provision of the Constitution which denies to the legislature their power to pass the act, and not only to point out the provision or provisions that are violated, but to hold beyond a reasonable doubt that the act conflicts with such provision of our organic law. *Johnson v. Reeves & Co.*, 227.

6. *General and special acts. Taxation.*

Act 1916, chapter 231, amending Code 1906, section 4750, providing that all authority of the state revenue agent to prosecute suits or appeals to assess for taxation an agricultural product are revoked and annulled and that appeals shall abate and be dismissed, is a general law and not in violation of Constitution 1890, section 87, prohibiting special and local laws. *Ib.*

7. *Same.*

Such statute does not exempt property from taxation, levy or sale nor is it intended to create, increase or decrease the fees, salary, or emoluments of any public officer, and is therefore not violative of any of the provisions of section 90 of the Constitution of 1890. *Ib.*

8. *Same.*

Such statute does not violate section 100 of the Constitution since it does not remit, release, postpone or diminish the fixed liability or obligation of any taxpayer. It does not undertake to declare that those who owe past due taxes on agricultural products are or shall be freed from such liability. *Ib.*

9. *General rules.*

In construing an act the court must look to the act as a whole and not hang upon a single word therein. *Ib.*

10. *Corporations. Foreign corporations. Filing Charter. Now doing business within the state. Retroactive effect.*

The amendatory Act of 1916, chapter 92, does not apply to corporations which had already complied with the law and were there-
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STATUTES AND STATUTORY CONSTRUCTION.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

by lawfully doing business in this state. The act does not by its express terms require a refiling of any charter and the words "now or hereafter doing business in this state," should be interpreted to embrace foreign corporations in fact doing business in this state without having filed their charters, and paid the fees required by section 935 of the Code, and also corporations which should thereafter apply for admission into the state. *Power v. Mortgage Co.*, 319.

11. *Same.*

The passage of chapter 92, Laws 1916, repealed section 925 of the Code and any demand thereafter made by the secretary of state is necessarily based upon the new act. *Ib.*

12. *Same.*

To hold that this section requires corporations which had already complied with the law to refile their charters, would give to the act a retroactive effect and impose an additional burden upon those corporations doing business in this state by invitation and license of this state. *Ib.*

13. *Same.*

A statute should not receive such construction as to make it impair existing right, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the legislature. In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their liberal extent to comprehend existing cases. *Ib.*

14. *Appeal and error. Orders appealable. Interlocutory orders.*

The right to appeal in any case to the supreme court is regulated and defined by statute and where the court sustained a demurrer to the bill on the ground that it was not sufficient and granted sixty days to amend, an appeal taken to settle the principles of the case will be dismissed in the supreme court, since such decree does not require the payment of money; does not change the possession of property and an appeal therefrom does not settle the principle of the case nor does the prosecution of such appeal avoid expenses and delay but on the contrary, adds to the expenses, and if entertained, will greatly delay the final adjudication on the merits. *Armstrong v. Moore*, 511.

15. *Partial invalidity.*

If section 16 of the Laws 1916, chapter 527, providing that indictments pending in Harrison county should be tried there instead of in Stone county when elected, was violative of constitution of

STATUTES AND STATUTORY CONSTRUCTION.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

1890, section 26, as denying a public trial by a jury of the county where the offense was committed, this would not invalidate the whole act providing for the creation of Stone county. *Hatten v. Bond*, 590.

16. *Same.*

Nor does the fact that section 14 of the act requires Stone county to execute and complete contracts entered into by Harrison county so far as they affect the territory of Stone county invalidate the entire act. *Ib.*

17. *Counties. Compensation of offices. Auditor.*

Under Code 1906, section 2206, providing that in counties having two judicial districts the officers may be allowed the compensation therein provided for each district, it was the intent of the legislature, that this section should apply to all county officers in the allowance of compensation for their services in counties composed of two judicial districts. The language "compensation herein provided," as used in this section was not intended to be limited to the compensation allowed as fees to those officers named in Chapter 49, Code 1906. *Revenue Agent v. Browns*, 665.

18. *Same.*

In arriving at the spirit and intent of a statute of this kind, it is proper to take into consideration any other statutes in the code relating to the same subject, and if material to each other they should be construed together consistently and harmoniously if possible as one scheme, in order to ascertain the true intent of the legislature in dealing with that particular subject. *Ib.*

19. *Same.*

Section 2206, Code 1906 applies to the compensation allowed to county auditors by section 348, Code 1906 and the board of supervisors in counties composed of two judicial districts have the lawful authority, within their discretion to allow the fixed compensation for each district of such counties. *Ib.*

20. *Sufficiency of title.*

There is no constitutional requirement as to the sufficiency of the title of a legislative act. *Bryan v. City of Greenwood*, 718.

21. *Amendment. Constitutional provisions. "To be amended as follows."*

Laws 1912, chapter 260, providing that the statutes therein dealt with should "be amended as follows" does not violate section 61 of the Constitution, for the Legislature, by providing that the statutes therein dealt with should "be amended as follows" mani-

STENOGRAPHER—SUPREME COURT RULES.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

festly intended that they should "be amended so as to read as follows." *Bryan v. City of Greenwood*, 718.

22. *Fish. Game. Validity. Construction under void statute.*

A majority of the supreme court are agreed that chapter 99, Laws 1916, should not be regarded in force and effect in Mississippi, and from this it necessarily follows that there is no such public office now as that of state game and fish commissioner. *State v. Brantley*, 812.

23. *Same.*

Laws 1916, chapter 99, being void, no conviction thereunder can be sustained. *Id.*

STENOGRAPHER.

See OFFICE.

STREET IMPROVEMENTS.

1. *Municipal corporations. Right of property owner to make.*

Since no duty is imposed on the Legislatures by the Constitution to permit property owners to make special improvements themselves and such a provision could have been omitted altogether from the statute, the question whether the 30 days allowed property owners under the statute to do the work themselves, is a sufficient length of time to enable them to do so, is wholly immaterial. *Bryan v. City of Greenwood*, 718.

2. *Municipal corporations. Ordinance.*

Where an ordinance providing for street improvement was duly published, a property owner cannot resist payment of his assessment on the ground that he failed to protest against the improvement; because he thought the city intended to pay the entire cost thereof itself and charge no part thereof to the property owners, for the reason that it adopted an ordinance providing for the issuance of bonds for the purpose of obtaining money with which to pay for improvements on several of its streets on one of which defendant's property was located. *Id.*

SUPREME COURT RULES.

Appeal and error. Disposition of cause. Reward on special issue.

Under Supreme Court Rule 13, so providing when a judgment is reversed and a new trial ordered because the damages are excessive or inadequate and for no other reason the judgment will be set aside only as to damages and be good in all other respects and where a judgment was reversed because of the refusal of the court below to grant an instruction bearing solely on the measure

SURFACE WATER—TAXATION.

SUPREME COURT RULES—Continued.

of damages, and the cause was remanded generally, a motion to correct the judgment so as to remand the case for trial only on the question of damages will be sustained. *Railroad Co. v. Boon*, 493.

SURFACE WATER.

Drainage. Prescription. Knowledge.

The right of drainage across the land of another is not gained by prescription though continued for twelve years, where such drainage was by tile drainage and was unknown to the owner of the lower land. *Holman v. Richardson*, 216.

TAXATION.

1. *Refrigerator cars. Earnings. Constitutional provisions. Special mode of valuation and assessment. Equal protection of law. Uniform and equal. Burden upon interstate commerce.*

Laws 1912, chapter 113, sections 1-8, designating as freight line companies every corporation engaged in the business of operating, furnishing or leasing cars for the transportation of freight on railroad lines in whole or in part within the state not owned or operated by such corporations, and not otherwise listed for taxation, and requiring such corporation to make certain sworn statements to the state auditor, and providing that for purposes of taxation such cars shall have a *situs* within the state, and imposing a tax upon the property of such corporations of three per cent., upon their gross earnings, and providing for the collection of such tax, and penalties for failure to furnish a statement or to pay the tax, considered with Laws 1912, chapter 114, taxing equipment companies, includes refrigerator cars, the property of a packing company, used solely for the transportation of its products over railroad lines within and without the state, though it owns or leases no railroad within the state or elsewhere. *Packing Co. v. Stovall*, 106.

2. *Refrigerating cars. Earnings. Constitutional provisions. Special mode of valuation and assessment.*

Such Statute does not contravene either section 112 of our state Constitution or any provision of the Federal Constitution, since by the express provisions of section 112 of our state Constitution the legislature may provide for a special mode of valuation and assessment for corporate property or for particular species of property belonging to persons, corporations or associations not situated wholly in one county, and such statute is a means of imposing a legitimate tax on the rolling stock of a packing company situated and used in the state. *Ib.*

TAXATION.

3. *Same.*

Such tax is equal and uniform as contemplated by section 112, because all property of the same kind is classed for taxation in the same way. *Packing Co. v. Stovall*, 106.

4. *Same.*

Such tax is not invalid as imposing a burden on interstate commerce. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from taxation and since resort to the receipts of property or capital employed in part at least, in interstate commerce, when such receipt or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, such tax is within the taxing power of the state. *Ib.*

5. *Counties. Bonds. Statutes. Sufficiency.*

Since Laws 1914, chapter 176, section 11, requires the consent of the taxpayers themselves to the issuance of bonds for road taxes, the act is not subject to attack on the theory that bonds might be issued to such an amount that they would become confiscatory, for taxpayers if same would not consent to such confiscation, and the courts are not bound to protect them from their folly. *Rosenstock v. Board of Sup'rs.*, 124.

6. *Counties. Bonds. Limitations.*

Section 331, Code 1906, relating to issuance of bonds by the board of supervisors, prohibits the issuance of bonds to an amount which added to all of the bonded indebtedness of a county shall exceed five per cent. of the assessed value of the taxable property appearing on the assessment roll. Laws 1914, chapter 176, as amended by Laws 1916, chapter 174, authorizes the issuance of highway bonds on a vote of the qualified electors without limitation. These two acts are not irreconcilable, since the first imposes limitation on the powers of the board of supervisors, while the latter merely authorizes the taxpayers to tax themselves. *Ib.*

7. *"Ownership." "Privilege." "Property." "Right of ownership." Value. Statute. Validity. Privilege tax.*

Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. In a strict legal sense property is synonymous with the right of ownership, and means one's exclusive right of possessing, enjoying and disposing of a thing. *Thompson v. Kreutzer*, 165.

8. *Same.*

A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself.

TAXATION.

TAXATION—Continued.

So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. *Ib.*

9. *By value. Statutes. Validity. Privilege tax.*

Chapter 112, Laws 1912, imposes a tax on property and such tax not being in proportion to its value, violates section 112 of the Constitution of 1890, and is void. *Ib.*

10. *Equality. Property tax. Constitutional provisions.*

Chapter 110, Laws 1914, entitled, "An act to levy, collect and enforce the payment of an annual privilege tax or occupation fee upon all persons, associations of persons, or business firms and corporations, pursuing the business of extracting turpentine from standing trees" and fixing the tax at one-fourth of one per cent. each year for each cup or box, is a property tax and not a privilege tax, and is violative of Constitution 1890, section 112, providing that taxation shall be uniform and equal throughout the state, and that property shall be taxed in proportion to its value. *Thompson v. McLeod*, 383.

11. *Property. Turpentine leases.*

A turpentine lease is a thing of value—"property" upon the value of which the state can levy an *ad valorem* tax. *Ib.*

12. *Tax title. Judgment. Conclusiveness. Void tax sale. Actions. Presentation of claim. State's liability to suit. Venue.*

Where in an action under Code 1906, section 2927, to confirm a tax title conveyed by the state there was a decree declaring the purchasers title void, such a decree would justify the presentation to the auditor of a claim for the purchase money and if the auditor should refuse to issue a warrant in payment of the claim thus presented then, and not until then, could the purchaser under section 4800 of the code institute a suit against the state. *Land Commissioners v. Ford*, 678.

13. *Void tax title. Actions. Statute.*

Under section 4801, Code 1906, so providing, a bill to recover from the state the purchase price of a void tax sale cannot be taken as confessed. *Ib.*

14. *Schools and school districts. School Taxes. Duty of collector.*

Where any municipality, together with separate adjacent annexed territory, constitutes a separate school district, under the provisions of chapter 118, Laws 1914, it is the duty of the municipal tax collector, and not the sheriff, to collect the separate school district taxes levied upon property situated in such separate adjacent annexed territory. *Town of Carrollton v. Vance*, 773.

TAXES—TELEGRAPHS AND TELEPHONES.

TAXATION—Continued.

15. *Liability of holder of legal title. Personal property.*

The lessor of a soda fountain, being the holder of the legal title thereof, is liable for the personalty tax thereon. *Robertson v. Mfg. Co.*, 890.

16. *Personal liability. Owner. Contract to assume. Effect.*

When the taxing board discovers the owner of the legal title, its duties are performed when it assesses the property to such owner, without regard to the equities which may exist between the owner and his lessee. *Ib.*

TAXES.

1. *Constitutional law. Imprisonment for debt. Dog tax.*

The provision of the state Constitution prohibiting imprisonment for debt has reference to debts founded on contract. It has no application to taxes. *State v. Widman*, 1.

2. *Constitutional law. Ex post facto law. Dog tax.*

Where Laws 1910, chapter 148, providing for a tax on dogs and making it optional with each county whether its provisions should be put in operation therein either by the board of supervisors or by an election, was put in operation in a county by an order of the board of supervisors on February 5, 1914, and defendant was tried under an affidavit charging him with failing to pay a tax on a dog owned by him on February 1, 1914, such a trial was not under an *ex post facto* law, since the law put the tax into immediate operation, and the offense charged was the failing to pay taxes when due and this occurred after the law was put in force. *Ib.*

TAX TITLE.

See TAXATION.

TELEGRAPHS AND TELEPHONES.

1. *Negligence. Sufficiency of evidence. Punitive damages. Willful negligence.*

Under the facts set out in its opinion the court held that the acts complained of constituted mere negligence on the part of the defendant, not characterized by wantonness or willful wrong. *Telegraph Co. v. Koonce*, 173.

2. *Same.*

In such case no punitive damages could be recovered, mere brusqueness of an agent not amounting to insult and being no grounds in law for the infliction of punitive damages against his principal. *Ib.*

TENANCY IN COMMON—TRESPASS.

TELEGRAPH AND TELEPHONES—Continued.

3. *Mental Suffering. Willful wrong.*

No action lies for the recovery of damages for mere mental suffering, disconnected from physical injury and not the result of willful wrong. *Ib.*

4. *Punitive damages. Federal law.*

Under the Federal Rule the master is not liable for punitive damages unless he participates in the wanton or malicious act of his servant or agent or subsequently ratifies it and this rule applies in a suit for damages from delay in delivering an interstate telegram. *Telegraph Co. v. Showers*, 411.

TENANCY IN COMMON.

Acquisition of superior title.

Where one cotenant purchases an outstanding superior title to the common property, he acquires thereby the legal title to the whole of it, but holds such title in trust for the benefit of those of his cotenants who may wish to avail themselves of it by contributing or offering to contribute their proportion of the purchase money, which right, as between him and his cotenant, will not be barred by mere lapse of time, but only when the delay to assert it, is accompanied by circumstances which give rise to an estoppel. *Barksdale v. Learnard*, 861.

TENDER.

See RELEASE.

TRADERS.

See ATTACHMENT.

TRESPASS.

1. *Trespass less than larceny. Taking hog. Statute.*

Where defendant assisted the owner of a cornfield, to take up and pen a hog belonging to another, which was depredating in said field, and the owner of the field demanded of the owner of the hog fifty cents for taking it up which he refused to pay, and thereupon defendant bought the hog from the party taking it up and offered the hog to its owner for fifty cents. In such case he was not guilty of violating Code 1906, section 1264, which provides, that any person who shall, without the owner's consent, take and carry away any hog, etc., where the taking and carrying away does not amount to larceny, shall be fined or imprisoned, but that the section shall not apply to any one who takes property believing in good faith that he has a right to it, since in such case there was nothing wrongful in the taking up

TRIAL.

TRESPASS—Continued.

of the hog but it was taken up in good faith. *Husbands v. State*, 17.

2. *Elements of damages. Taking property without legal process.*

Where appellant went upon the premises of appellee over his protest and without having any writ or warrant of any kind from any officer of the law, took possession of a mule he had sold on a conditional contract and thereby frightened appellee's wife, and putting him to expenses in recovering the property, the jury may consider not only the value of the mule, but all other circumstances in fixing the damage. *Wilson v. Kuykendall*, 486.

3. *Same.*

Under the law a party has not the right to invade the premises of another and take from the possession of the other party by force against the will of the party in possession any property, even though he may have title thereto. He must in such case resort to the courts to obtain possession, if the party in possession refuses on demand to deliver the property. *Id.*

TRIAL.

1. *Instructions. Assuming facts. Carriers. Passengers. Action. Instructions. Carrying beyond destination. Punitive damages.*

In an action for damages against a street railway company for carrying plaintiff beyond her destination, an instruction that it was the duty of defendant to keep a lookout for signals, to stop its cars at all regular crossings on the usual signal, and if the jury believed that the agents of defendant did not stop when signalled by plaintiff, but carried her beyond and did not back when requested to do so, plaintiff was entitled to recover damages suffered thereby, was erroneous in assuming that the signal was properly given and recognized. *Light & Traction Co. v. Taylor*, 60.

2. *Criminal law. Swearing jurors.*

The failure to specially swear the jury in a capital case, as required by Code 1906, section 1483, was not a jurisdictional defect and must have been taken advantage of before verdict as provided by section 1413, Code 1906, and where a defendant accepted the jury and went to trial on the facts without exception on this ground, such exception could not be first made in a motion for a new trial, since section 4936, Code 1906, provides that no judgment shall be reversed for any defect which might have been taken advantage of before verdict, and which was not then urged. *Hill v. State*, 375.

TRIAL.

TRIAL—Continued.

3. *Criminal law. Court's remarks in selecting jury. Homicide. Admissibility of evidence. Previous uncommunicated threats by decedent. Previous communicated threats. Self defense. Circumstances preceding act. Instructions. Weight of evidence. Ignoring defendant's version.*

Where on a trial for homicide the whole trend of the *voir dire* examination was to influence the proposed jurors against the defendant and to strongly impress them with the idea that their duty was to convict; and each juror was given to understand that he would be a man of very little moral courage unless he found a verdict of guilty, such an examination was erroneous and very prejudicial to the defendant. *Leverett v. State*, 394.

4. *Collateral note. Action to recover interest. Instruction.*

Where plaintiff brought suit against a bank to recover his alleged interest in a note which had been deposited as collateral with the bank and collected by it, where the evidence strongly tended to show a partnership between plaintiff and the party pleading the note, an instruction was erroneous, which authorized a verdict for the plaintiff if he had an interest in the note and had not agreed that it might be pledged as collateral, since such an instruction was prejudicial to defendant as ignoring the evidence as to a partnership. *Bank of Tupelo v. Hulsey*, 632.

5. *Peremptory instruction. Consideration by the jury.*

While it is not necessary for the jury to actually retire to consider a peremptory instruction, still before the law is actually given in charge to the jury the whole law of the case is within the breast of the trial judge and under his control. *Edwards v. Railroad*, 791.

6. *Criminal law. Comments of district attorney.*

In a prosecution for attempting to commit an abortion it was reversible error for the prosecuting attorney to comment to the jury on the failure of the defendant to introduce his wife as a witness. *Smith v. State*, 802.

7. *Instructions. Degree of proof.*

In a suit for damages to plaintiff's pasture by fire started on a railroad right of way, where the defense was that the fire originated elsewhere, an instruction that if the jury was in doubt as to the origin of the fire, and could not say of a certainty which fire was the cause of the damages, they should find for the defendant, is erroneous, because it imposes on the plaintiff a greater burden of proof than the law requires. *Silvenson v. Railroad Co.*, 899.

TRUSTEES—UNDERTAKERS.

TRUSTEES.

See TRUSTS.

TRUSTS.

1. *Wills. Construction. "Demonstrative legacy." "Specific legacy."*

A bequest to a trustee to create, from the proceeds of the testator personal property and the sale of his real estate not situated in this state, a fund of two thousand five hundred dollars to be paid to a state charitable hospital, was not under the will in this case intended by the testator to be a "specific legacy" but a "demonstrative legacy," to be paid out of the general assets of the estate of the testator, if necessary, and was not adeemed because of the partial failure of the particular fund from which it was to come. *Halley v. McLaurin's Estate*, 705.

2. *Same.*

The intent of the testator must control and determine the character of a legacy. *Ib.*

3. *Wills. Bequest. "Religious or ecclesiastical corporation or association."*

Under chapter 115, Laws 1910, the board of trustees of the Mississippi State Charity Hospital are authorized to receive bequests of property when not contrary to the state Constitution, and such a bequest of personal property is not violative of our statutes of mortmain sections 5090 and 5091, Code 1906 which are the same as sections 269 and 270 of our state Constitution. *Ib.*

TRUSTS AND TRUSTEES.

See WILLS.

TRUTH.

Innocent purchaser. Undisclosed trust.

A *bona-fide* purchaser from one having the legal title, takes it free from a trust for a cotenant of the seller when the purchaser had no actual or constructive notice of such trust. *Barksdale v. Learnard*, 861.

UNDERTAKERS.

Licenses. Tax on undertakers. Statutes.

Under Laws 1916, chapter 90, requiring each dealer in coffins, if an undertaker, to pay one hundred dollars for a privilege license but providing that a merchant carrying coffins in stock and paying a privilege license on the stock shall pay a tax of five dollars in addition to the tax required of him as a merchant; where a merchant carries a stock of coffins in addition to his

U. S. CONSTITUTION—VENDOR AND PURCHASER.

UNDERTAKERS—Continued.

other stock and takes charge of dead bodies and prepares them for burial and does all things necessary to constitute him an undertaker he is liable to the tax of one hundred dollars without reference to whether he sells merchandise or not. *Smith v. Perkins*, 870.

U. S. CONSTITUTION CITED AND CONSTRUED.

Const., U. S. Amend. 14. Animals. Tax or license. Constitutional provisions. Equal protection of the law. Dog tax. Evidence. Judicial notice. Ex post facto law. Imprisonment for debt. Repeal of law. *State v. Widman*, 1.

Sec. 10. Art. 1. Constitutional law. Impairing obligation of contracts. Application. *Planting Mill Co. v. Railroad Co.*, 148.

VALUED POLICY.
Insurance. Household goods. Valuation. Statute.

Where the contract of insurance expressly insured the property as household furniture, and the various articles had been severed from the stock of the insured and delivered to the purchaser, put in order and were actually being used as household furniture they must be so classed. In such case the valued policy law applied and the insurer having the right of inspection when the insurance was written, could not show that the actual cash value of the property was worth less than the amount of the insurance. *Insurance Co. v. Heidelberg*, 46.

VENDOR AND PURCHASER.
1. Innocent purchaser. Record notice.

A purchaser of land is not charged with constructive notice of the recitals of deeds of trust thereon which do not appear in his chain of title. *Barksdale v. Learnard*, 861.

2. Innocent purchaser. Duty of inquiry.

That a purchaser of land had actual knowledge of a deed of trust thereon, imposed upon him no duty of inquiring into the state of the title, other than that with which he was charged by reason of such deed of trust being of record. *Ib.*

3. Innocent purchaser. Undisclosed trust.

A bona-fide purchaser from one having the legal title, takes it free from a trust for a cotenant of the seller when the purchaser had no actual or constructive notice of such trust. *Ib.*

4. Innocent purchaser. Equity of infant.

An infant having an equity in land has no better standing than an adult, as against an innocent purchaser of the land from one having the legal title. *Ib.*

VENUE—VERDICT.

VENDOR AND PURCHASER—Continued.

5. *Innocent purchaser.*

A purchaser from an innocent purchaser stands in the position of an innocent purchaser, irrespective of notice. *Berksdale v. Learnard*, 861.

VENUE.

1. *Criminal law. Manslaughter. Sufficiency of evidence. Judicial notice. Municipalities. Existence and general course of railroads. Appeal. Reversal. Trial. Swearing jurors. Exception.*

The court held that under the facts of this case as set out in the opinion that the venue of the crime was established in Wilkinson county. *Hill v. State*, 375.

2. *Change. Defendant's residence.*

Where a suit against the state and several other defendants was dismissed as to the state and none of the other defendants lived in the county where the suit was brought, the venue was properly changed to the county, of the residence of the principal defendant. *Export Co. v. State*, 452.

VERDICT.

1. *Criminal law. Presence of accused. Reception of verdict.*

Where in a prosecution for the unlawful sale of intoxicating liquors, after the jury had retired and before their return the court adjourned until the following day, until which time all parties and witnesses were discharged and after adjournment and after accused had left the court room, the jury notified the court that they were ready to report and the court without notice to accused or his counsel received the verdict, finding defendant "guilty as charged." In such case the court's action was reversible error, since it denied accused his constitutional right to be present at every stage of the trial. *Woods v. City of Tupelo*, 132.

2. *Criminal law. Presence of accused. Reception of verdict.*

Where in a trial of defendant for keeping liquor for unlawful purposes the jury returned a verdict of guilty to the clerk after court had adjourned for the noon hour and in the absence of the judge the defendant, and her counsel, without any agreement of the defendant or her counsel that the verdict might be returned in such manner, or any agreement whatever with reference to the return of the verdict by the jury and the defendant did not in any way waive her presence when the verdict was returned, the return of the verdict under such circumstances was reversible error as denying to accused, her constitutional right to be present at every stage of the trial. *Hunt v. City of Tupelo*, 178.

WAGER—WILLS.

WAGER.

See GAMING.

WATERS AND WATER COURSES.

1. *Surface waters. Right to deflect. Drainage. Prescription. Knowledge.*

The common-law rule which obtains in Mississippi, is that surface water is a common enemy which every proprietor may fight as he deems best, regardless of its effect upon other proprietors, and that accordingly the lower proprietor may take any measures necessary for the protection of his property, although the result is to throw the water back upon the land of an adjoining proprietor. *Holman v. Richardson*, 216.

2. *Same.*

Where surface water has been accustomed to gather and flow along a well-defined channel which by frequent running, it has worn into the soil, it may not be obstructed to the injury of the dominant proprietor and a lower proprietor must protect himself with due regard to the rights of the upper proprietor and so as not to injure him unnecessarily, and is liable for any injury due to his recklessness or negligence. *Id.*

WIDOW.

Allowance. Priority. Judgment lien.

The right of a widow to the allowance of one year's provision from the estate of her deceased husband given by section 2052, Code 1906 is superior to the lien of a judgment creditor of her husband although such judgment was enrolled before her husband died. *Bank v. Donald*, 681.

WILLS.

1. *Estates created. Executory devise. Remainders. Supervisor.*

Where a testator by will devised lands to four daughters, with the provision that if any of them died without issue or bodily heirs, her part should go to the surviving sisters or sister, declaring an intention that the daughters should share and share alike, in such case each of the four daughters took a fee, defeasible upon their deaths without issue, leaving one or more of the other devisees surviving them; the limitation over upon the death of each without issue to the survivor or survivors being a valid executory devise. *Armstrong v. Thomas*, 272.

2. *Same.*

In such case where three of the sisters had acquired the interest, of the fourth, on the death of one of the three a one-third interest

WILLS.

WILLS—Continued.

in her share of the estate shifted to and becomes vested in a surviving sister in fee absolute, there being nothing in the will to indicate that she should take it with the limitation over to which her original share was subject. *Armstrong v. Thomas*, 272.

3. *Estates created. Executory devise. Survivors.*

Where a testator devised lands to his four daughters in fee, defeasible upon the death of any one without issue leaving one or more of the other daughters surviving her, so that the limitation over to the survivor or survivors was a valid executory devise, the deaths of two of the sisters leaving children surviving them terminated their contingent interest in the limitation over and the fee in the surviving sister became absolute and so children of prior deceased sisters took nothing; the word "survivor" meaning one who outlives others and must be given this meaning in devises of this character in the absence of words indicating that such was not the testator's intention. *Ib.*

4. *Estate created. Life estate.*

Where by will a testator devised all of his estate to his wife so long as she remained his widow, but provided that if she married she should have one-half thereof during life and the remainder to her children, but, if there were no children then to the testator's relatives, and that if she married, one-half of the estate should immediately go to his same relatives. In such case the widow did not take a conditional fee, but at best a mere life estate and on her death without children her relatives took nothing. *Hale v. Neilson*, 291.

5. *Estates created. Life estates.*

Such will although it devised the remainder only on a condition which never happened to wit: the widow's remarriage, passed the estate on her death to the testator's relatives named in his wills. *Ib.*

6. *Construction. Presumptions.*

Where every expression in the will manifests an intention on the part of a testator to dispose of all his estate, the presumption arises that he did not intend to die intestate as to any part of it, and his will if possible will be so construed. *Ib.*

7. *Construction. Instrument taking effect at death of grantor.*

Where it is clear from the language of an instrument in the form of a deed that it was the donor's intention that the instrument itself, should not take effect, for any purpose, until after the death of the maker, it must be held to be testamentary in character, and therefore not a deed. *Simpson v. McGee*, 344.

WILLS.

WILLS—Continued.

8. *Probate. Custodian. Duty to produce.*

A party having the possession of a will after the death of the testator is a trustee only to the extent that he is the custodian of the will and his duty only extends to producing the will and having it probated. *Oaulk v. Burt*, 660.

9. *Character of instrument. Testament or deed.*

An instrument executed by three brothers who were engaged in the operation of a plantation owned by two of them, which provided that on the death of any one of them, his interest, in the property was to vest in the others, subject only to his personal debts, and that in the event of the death of two of them, the property should vest in the survivor, the expressed purpose being that the business might be carried on without interruption did not convey to any of the parties thereto any interest in the property of the others, to vest, either immediately or in the future, but the object sought to be accomplished by it was to cause whatever property each of the parties thereto might own at his death, to vest when that event should occur, in the surviving party or parties. The instrument therefore is testamentary in character, and can have no operation as a deed. *Thomas v. Byrd*, 692.

10. *Construction. "Demonstrative legacy." "Specific legacy."*

A bequest to a trustee to create, from the proceeds of the testator personal property and the sale of his real estate not situated in his state, a fund of two thousand five hundred dollars to be paid to a state charitable hospital, was not under the will in this case intended by the testator to be a "specific legacy" but a "demonstrative legacy," to be paid out of the general assets of the estate of the testator, if necessary, and was not adeemed because of the partial failure of the particular fund from which it was to come. *Hailey v. McLaurin's Estate*, 705.

11. *Same.*

The intent of the testator must control and determine the character of a legacy. *Id.*

12. *Bequest. "Religious or ecclesiastical corporation or association."*

Under chapter 115, Laws 1910, the board of trustees of the Mississippi State Charity Hospital are authorized to receive bequests of property when not contrary to the state Constitution, and such a bequest of personal property is not violative of our statutes of martmain sections 5090 and 5091, Code 1906 which are the same as sections 269 and 270 of our state Constitution. *Id.*

WITNESSE—WRIT OF INQUIRY.

WILLS—Continued.

13. *Validity. What law governs.*

The validity of a will of a citizen of Mississippi who devises lands to charitable institutions is governed as to land in Tennessee, by the laws of that state which do not prohibit such devises of land or money raised by the sale thereof, to charitable institutions as are condemned by section 269 of our Constitution. *Hailey v. McLaurin's Estate*, 705.

WITNESS.

Criminal prosecution. Character of evidence. Cross examination.

Where in a prosecution for attempting to commit an abortion the defendant introduced witness to prove his character as to the trait charged, it was not error to permit the witness on cross-examination to state that they had heard charges of this kind against defendant before, but that they knew personally nothing of these matters, since the defendant having put his character as to this charge in evidence, it was permissible for the state to cross examine the witness in this way. *Smith v. State*, 802.

See CRIMINAL LAW.

WRIT OF INQUIRY.

Damages.

In an *ex delicto* case there is no necessity for the issuing of a writ of inquiry in a trial before a justice of the peace because under our law, unless a jury is called for, the justice of the peace passes upon the question of liability, and at the same time upon the question of the amount of damages, and it is only necessary when judgment is taken by default to introduce testimony as to the damages. *Welch v. Hattie*, 79.

